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OCTOBER TERM, 1994

NATIONAL PAINT & COATINGS ASSOCIATION; RUST-OLEUM CORPORATION, an Illinois corporation; THE SHERWIN-WILLIAMS COMPANY, an Ohio corporation; ACE HARDWARE CORPORATION, a Delaware corporation; TRU-TEST MANUFACTURING COMPANY, a Delaware corporation; FMA, INC., d/b/a JIM'S ACE HARDWARE, an Illinois corporation; W.C. SCHAUER HARDWARE CENTER, INC., an Illinois corporation; and SMILEY ACE HARDWARE, INC., an Illinois corporation,

Petitioners,

v.

CITY OF CHICAGO, an Illinois municipal corporation,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1) Does the Commerce Clause test outlined in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), and subsequent Supreme Court cases apply to ordinances that regulate evenhandedly, i.e., do not discriminate against interstate commerce?

2) In applying the *Pike* test, can the district court hold an evidentiary hearing as to whether the burden imposed on interstate commerce by a local ordinance is clearly excessive in relation to the putative local goal and as to whether the stated goal can be promoted with a lesser impact on interstate commerce?

LIST OF PARTIES

All parties are set forth in the caption. A Rule 29.1 list of corporate petitioners was filed on February 24, 1995 in connection with the Petitioners' Application for a Stay.

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CITY OF CHICAGO, an Illinois municipal corporation,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The September 29, 1993 Memorandum Opinion and Order ("District Court Order") of the United States District Court for the Northern District of Illinois enjoining enforcement of § 4-132-150 of the Municipal Code of Chicago (sales ban ordinance) as a violation of the Commerce Clause is reported at 835 F. Supp. 421 (N.D. Ill. 1993) (App. 2, p. 20). The January 24, 1995 Opinion and Order of the United States Court of Appeals for the Seventh Circuit reversing the District Court Order is reported at 45 F.3d 1124 (7th Cir. 1995) (App. 1, p. 1).

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on January 24, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1) The Commerce Clause, U.S. Const. art. I, § 8, cl. 3:

> The Congress shall have Power . . . To regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes.

2) Municipal Code of Chicago, Illinois § 4-132-150 (1992):

> It shall be unlawful for any person holding a retail business license to sell paint in spray cans to any person or to sell any marker containing a fluid which is not water soluble and has a point, brush, applicator or other writing surface of three-eighths of an inch or greater to any person.

STATEMENT OF THE CASE

The Seventh Circuit decision in this case represents a departure from twenty-five years of Supreme Court precedent and alters the analytical framework of dormant Commerce Clause analysis. As a result, legitimate household products and millions of dollars of interstate commerce may not be entitled to Commerce Clause protection traditionally afforded by this Court and other circuits.

This case involves a Chicago ordinance that banned the retail sale of spray paint and large markers in the City as a supposed anti-graffiti measure. The district court held the ordinance unconstitutional under the dormant Commerce Clause test enunciated by this Court in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). In doing so, the district court found after a trial that: (1) the sales ban would have a substantial impact on interstate commerce; (2) the ordinance would not lessen graffiti in Chicago; and (3) less restrictive alternatives existed for combatting graffiti. The City did not contest these factual findings on appeal.

Nevertheless, departing from *Pike* and twenty-five years of precedent from this Court and several courts of appeals, the Seventh Circuit reversed the district court's decision and held the ordinance constitutional. In so ruling, the court below fundamentally changed dormant commerce clause analysis by replacing the virtual per se standard of invalidity for ordinances that discriminate in effect against interstate commerce with the less stringent *Pike* test that was formerly reserved, by its express terms, for review of nondiscriminatory ordinances. For those nondiscriminatory ordinances no longer subject to review under *Pike*, the Seventh Circuit imposed mere

rational-basis review. The effect of the Seventh Circuit's decision in this case, and recent decisions of the Third Circuit, is to give states and municipalities greater latitude in restricting millions of dollars of interstate commerce.

The petitioners seek certiorari in order to resolve the conflict in the law over the proper standards governing Commerce Clause cases. A more detailed statement of the case follows:

A. The District Court Relied Upon the *Pike* Test in Holding the Sales Ban Ordinance Unconstitutional.

On May 20, 1992, the City of Chicago passed municipal ordinance § 4-132-150 which barred the retail sale of spray paint and certain large markers. The petitioners, consisting of a national paint industry association and individual spray paint manufacturers, wholesalers, and retailers,[1] filed suit in the United States District Court for the Northern District of Illinois challenging the constitutionality of the ordinance as a violation of the Commerce Clause.[2] Jurisdiction was asserted pursuant to 28 U.S.C. § 1331. On June 23, 1992, the district court entered an order enjoining the enforcement of the order while the litigation proceeded, and the City voluntarily agreed not to seek review of that order.

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[1] The petitioners are the National Paint & Coatings Association; Rust-Oleum Corporation; The Sherwin-Williams Company; Ace Hardware Corporation; Tru-Test Manufacturing Company; FMA, Inc. d/b/a Jim's Ace Hardware; W.C. Schauer Hardware Center, Inc.; and Smiley Ace Hardware, Inc.

[2] The petitioners raised additional constitutional challenges to the ordinance, none of which are material for purposes of this petition.

After extensive discovery, the district court held a six-day trial. On September 29, 1993, that court entered an order declaring the sales ban unconstitutional. (App. 2, pp. 46-48). In doing so, the court reviewed the ordinance under the balancing test first enunciated by this Court in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). According to the plain language of that decision, the *Pike* test applied to statutes and ordinances that impacted interstate commerce, but did not discriminate against such commerce:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it can be promoted as well with a lesser impact on interstate activities.

Id. at 142.

Under this test, the district court held the ordinance unconstitutional, because: (1) the sales ban would have a substantial impact on interstate commerce; (2) the ordinance would not lessen graffiti in Chicago; and (3) less restrictive alternatives existed for combatting graffiti. (App. 2, pp. 46-48).

B. The Sales Ban Ordinance Would Affect Millions of Dollars in Interstate Commerce, Because Most Spray Paint is Manufactured Outside of Illinois.

Relying substantially on uncontroverted evidence, the district court determined that the spray paint sales ban

would impose significant burdens on interstate commerce. (App. 2, p. 42). Spray paint is sold in interstate commerce throughout the country, and approximately 99% of spray paint is used for legitimate purposes by hundreds of thousands of people in Chicago and by millions of people nationwide. The legitimate uses include: painting furniture, railings, radiators, barbecue grills, lawn and garden equipment, fences, toys, and other intricately shaped items; painting smooth surfaces to avoid brush marks; touch-ups on cars, appliances, cabinets, etc.; small painting jobs that do not warrant a full container of paint and brushes; art and theater uses; safety and hazard markings; and many other activities by homeowners preserving and improving their property. (App. 2, pp. 39-40).

Most spray paint sold in Chicago is manufactured outside of Illinois. (App. 2, p. 40). Testimony from experts for both the plaintiffs and the City showed that the sales ban would cause manufacturers outside of Illinois to lose tens of millions of dollars of sales as a result of the sales ban. (App. 2, pp. 40-41). Manufacturers outside of Illinois would also be forced to cut capital investment and employment. (App. 2, p. 41).

C. Most Graffiti is a Planned Activity Committed by Highly Motivated Teenagers Who Would Not Be Deterred by the Sales Ban.

As the district court found, graffiti is generally not a random act of vandalism. Instead, the vast majority of graffiti vandalism in Chicago is committed by highly motivated individuals, either taggers or gang members, who carefully plan their graffiti vandalism. (App. 2, pp. 26-27).

The term "taggers" is derived from the "tags" which are the stylized signatures of the graffiti writers' self-chosen nicknames. Taggers are overwhelmingly male teenagers. (App. 2, p. 28). They are highly mobile, "children of the transit system." (App. 2, p. 29). They travel throughout the city and suburbs by automobile, public transportation, and foot to obtain materials and write graffiti. (App. 2, p. 29). Taggers are intensely committed and, in some instances, are addicted to tagging, often running significant risks of physical injury in the process. (App. 2, pp. 29-30).

Achieving fame is a significant driving force, as taggers compete to obtain status among their peers. (App. 2, p. 29). Achieving fame necessitates a high degree of planning, energy and commitment; in their "hip-hop" culture, graffiti is not random or spontaneous. (App. 2, p. 29). Geographic dispersion is important to taggers, prompting those who live in Chicago to travel throughout the city and to the suburbs. (App. 2, p. 29). The most valued graffiti is that which carries the greatest risk of physical harm to the tagger, such as graffiti written on the third rail of the subway or at the top of a freeway sign. (App. 2, pp. 29-30).

A tagger typically obtains a sense of individual power by controlling various surfaces with his name or "tag"; taggers experience a collective power by being part of a movement or culture. (App. 2, p. 30). Taggers also value rebellion, *i.e.*, the chance to disobey conventional norms; many thrive on the push-and-pull with authorities inherent in graffiti writing. (App. 2, p. 30).

Distinct from tagger graffiti is the graffiti created by gang members. (App. 2, p. 30). Gangs use graffiti to mark territory and eulogize their dead, as an important

part of gang culture. (App. 2, p. 30). Gangs are not limited to the city's boundaries; they extend into the suburbs as well. Gang members are highly mobile; even members under the age of 16 drive or have access to cars. Within gang culture, far from being a random or unplanned activity, younger members are instructed on where and when to apply graffiti. (App. 2, p. 30). Gang leaders oversee the placing of graffiti to ensure that unwanted attention is not brought upon the gang. (App. 2, p. 30). The amount of graffiti created by gangs has been dwarfed by the amounts created by taggers and continues to diminish.

D. The Ordinance Would Not Lessen Graffiti, Because These Highly Motivated Graffiti Vandals Have Numerous Alternative Sources for Spray Paint and Other Graffiti Tools.

The evidence adduced at trial revealed that graffiti would not be diminished by the sales ban. Materials are available to vandals from many sources other than Chicago retail stores. For non-resident vandals creating graffiti in Chicago, spray paint and large markers are easily available near their homes in the suburbs. (App. 2, p. 35). For vandals who reside in Chicago, there is easy access, via both public and private transportation, to the suburbs where there are literally hundreds of outlets selling spray paint and large markers. (App. 2, p. 35). As to many of the structures hit by graffiti, transportation time to the suburbs is less than ten minutes. (App. 2, p. 35). Even if only a small number of graffiti vandals or their suppliers traveled to the suburbs, they would likely bring back enough spray paint and large markers to supply other vandals. (App. 2, pp. 35-36).

Within Chicago, a large underground market for spray paint and large markers already exists. (App. 2, pp. 35-36). For example, one black market supplier alone was responsible for up to 80% of the supply used by vandals on Chicago Transit Authority property. (App. 2, p. 36). Moreover, the effect of banning spray paint and large markers would be an increase in other, more destructive, forms of graffiti, such as etching. (App. 2, p. 37).

After considering the evidence as to who creates graffiti, why, and with what, the district court concluded that "the challenged ordinances will sadly have no deterrent effect whatsoever." (App. 2, p. 26). The City did not challenge this finding on appeal.

E. Less Restrictive Alternatives Exist to Deter Graffiti.

As to alternatives, the district court found that the City had not pursued viable alternatives to deal with graffiti that would have had a lesser impact on interstate commerce than a complete ban. For those anti-graffiti programs in existence before May, 1992, the City's funding had *declined* in years prior to the passage of the sales ban. (App. 2, p. 43). The anti-graffiti education programs at City agencies were sparse at best. Neither Chicago's Board of Education nor the Chicago Housing Authority had anti-graffiti programs. Thus, while no easy solution to graffiti exists, other alternatives were left unexplored or abandoned before the adoption of the sales ban. (App. 2, p. 44).

On the other hand, where resources were devoted to anti-graffiti efforts, both in Chicago and elsewhere, success has been achieved in arresting or reducing graffiti. For example, combining vigorous law enforcement and

prompt removal of graffiti in transit systems in both Chicago and New York has significantly impacted graffiti in those systems. (App. 2, p. 44). An additional component that has been effective in Chicago and elsewhere consists of wall-mural contests and other such programs involving "permission walls." (App. 2, p. 44). When compared with the ordinance's significant burden on interstate commerce, the non-existent benefits of the ordinance combined with the existence of viable but unexplored alternatives dictated that the ordinance violated the Commerce Clause. (App. 2, pp. 46-48).

F. Although the City Agreed the Case was Subject to the *Pike* Test, the Seventh Circuit Held that *Pike* was Inapplicable to the Present Case.

On appeal, the City acknowledged that its "ban on the retail sale of spray paint should be reviewed under the *Pike* test." City's Seventh Circuit Brief, pp. 13-14. Not contesting the district court's factual findings or the application of the *Pike* test, the City's principal argument before the Seventh Circuit was that the district court was precluded from conducting an evidentiary hearing in balancing the impact on interstate commerce against the putative benefits of the ordinance. The City argued that "there is no place under *Pike* for fact-finding." City's Seventh Circuit Brief, p. 16.

The Seventh Circuit reversed on an entirely different ground. (App. 1, p. 1). Despite the City's concession to the contrary, the Seventh Circuit held that the *Pike* test was inapplicable, because the ordinance was not discriminatory in purpose or effect. The court divided laws affecting commerce into three categories. (App. 1, p. 11). The first category consisted of laws that explicitly dis-

criminate against interstate commerce. (App. 1, p. 11). The court stated that such facially discriminatory laws were per se unconstitutional. The second category consisted of those laws that were facially neutral but had a discriminatory effect on interstate commerce. (App. 1, pp. 11-12). According to the court, such laws were to be analyzed under the *Pike* test. The third category consisted of laws that did not discriminate against interstate commerce but nonetheless impacted interstate commerce. (App. 1, pp. 12-13). The court concluded that such laws were subject to rational-basis review rather than review under the *Pike* test. Under the Seventh Circuit's three-prong analysis, the *Pike* test was inapplicable unless the challenged law *discriminated* against interstate commerce.

The Seventh Circuit classified the sales ban as a "third category" ordinance which was not subject to review under a per se or *Pike* standard but, instead, was subject to rational-basis review. (App. 1, pp. 13-14). Relying on Equal Protection Clause precedent and analysis, the majority of the panel below determined that the district court should not have conducted an evidentiary hearing to determine if the sales ban satisfied the rational-basis test.[3] (App. 1, pp. 3-7).

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[3] The concurrence disagreed with the majority's position that a district court was precluded or limited in conducting an evidentiary hearing. (App. 1, pp. 16-17).

REASONS FOR GRANTING THE WRIT

The decision below, along with recent decisions from the Third Circuit, alters the Commerce Clause framework enunciated by this Court and traditionally followed by the remaining circuits. For the past twenty-five years, this Court and most circuit courts of appeals have followed a two-prong approach in analyzing Commerce Clause cases. Under this approach, state laws or local ordinances that discriminate against interstate commerce, whether on their face or in their practical effect, have been held to be virtually per se illegal under the standard set forth in *Philadelphia v. New Jersey*, 437 U.S. 617 (1978). In contrast, nondiscriminatory regulations that nonetheless burden interstate commerce have been judged by the balancing test enunciated in *Pike*. Moreover, in analyzing nondiscriminatory ordinances under the *Pike* balancing test, this Court and several courts of appeals have recognized the district court's ability to conduct an evidentiary hearing.

The decision of the Seventh Circuit, however, invites a new approach to Commerce Clause jurisprudence that effectively limits the reach of the Commerce Clause. Along with recent decisions from the Third Circuit, the Seventh Circuit's decision purports to recognize a third category of Commerce Clause cases and to shift the application of *Pike* from nondiscriminatory regulations to discriminatory regulations. Ordinances that discriminate in their effect, and would hence be unconstitutional under a per se standard, could be constitutional under the less stringent *Pike* standard. Nondiscriminatory ordinances that would otherwise be unconstitutional under the *Pike* balancing test, such as the spray paint ban, would become constitutional, because the ordinances

would be analyzed under a rational-basis test. The Seventh Circuit's decision further limits the reach of the Commerce Clause by preventing the district court from conducting an evidentiary hearing when applying the *Pike* balancing test.

Certiorari is necessary to address and resolve the undeniable conflict between the decision below and the holdings of this Court and several courts of appeals. The conflict is not merely academic: millions of dollars of interstate commerce revolve around this Court's decision. Critical constitutional issues, involving millions of dollars of interstate commerce, should not turn upon the circuit in which a law is passed.

I. The Decision Below Is in Direct Conflict with Decisions of This Court and Other Courts of Appeals as to the Standard for Review in Commerce Clause Cases.

The *Pike* balancing test has long set the standard for deciding the constitutionality of evenhanded regulations that burden interstate commerce. The *Pike* test requires a court to balance the burden imposed upon such commerce against the putative local benefits of the regulation and to determine if the local benefits can be achieved by alternatives that are less burdensome on interstate commerce. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

The *Pike* test, however, has not been without its critics. Academics and other commentators have argued that the application of the test should be changed. *See* Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091 (1986); Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 Yale L.J. 425

(1982). Despite the explicit language in *Pike* stating that its test applies to statutes and ordinances that regulate evenhandedly, these commentators advocated a new approach to Commerce Clause cases under which evenhanded ordinances are reviewed under a rational-basis standard, rather than under *Pike*.[4]

The Seventh Circuit, along with the Third Circuit, has now followed these commentators and changed the *Pike* analysis. Under this new approach, Commerce Clause cases are divided into three categories, each subject to different scrutiny.[5] State and local ordinances that explicitly discriminate against interstate commerce are subject to the highest scrutiny and are virtually per se invalid. (App. 1, p. 11). Those laws that appear facially neutral but discriminate in effect against interstate commerce are to be reviewed under the *Pike* balancing test. (App. 1, pp. 11-12). The third category of laws—those that do not discriminate against interstate commerce—are subject merely to rational-basis review. (App. 1, pp. 12-13).

Thus, under the Seventh Circuit's three-prong approach, ordinances that do not discriminate against in-

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[4] Justice Scalia has endorsed this criticism, and has argued that this Court should confine the protections of the dormant Commerce Clause to laws that discriminate against interstate commerce. *See Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 897-98 (1988) (Scalia, J., concurring); *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 95 (1987) (Scalia, J., concurring).

[5] It is important to note that the three-prong approach does not eliminate the *Pike* balancing test and its perceived difficulty of application. Instead, the three-prong approach simply transfers application of the *Pike* test to a different category of cases.

terstate commerce warrant virtually no Commerce Clause protection. Those ordinances that do discriminate against interstate commerce merit different levels of Commerce Clause protection depending on whether the discrimination appears on the ordinance's face or only in its effect.

The Third Circuit has advocated a similar analysis of Commerce Clause cases. In *Instructional Systems, Inc. v. Computer Curriculum Corp.*, 35 F.3d 813 (3rd Cir. 1994), *cert. denied, Computer Curriculum Corp. v. Instructions Systems, Inc.*, 115 S. Ct. 1176 (1995), the Third Circuit addressed whether certain applications of the New Jersey Franchise Practices Act violated the Commerce Clause. In reversing the lower court's decision, the Third Circuit held that *Pike* was not invoked unless the burden on interstate commerce was discriminatory:

> Under this Court's precedent the *only* incidental burdens on interstate commerce that implicate the Commerce Clause . . . are those that discriminate against interstate commerce. We have so held because the Commerce Clause is concerned with protectionism and the need for uniformity, and case law demonstrates that legislation will not be invalidated under the *Pike* test unless it imposes *discriminatory burdens* on interstate commerce . . . . Thus, where the burden on out-of-state interests rises no higher than those placed on competing in-state interests, it is a burden on *commerce* rather than a burden on *interstate* commerce.

Id. at 826-27 (emphasis in original) (*quoting Old Bridge Chemicals, Inc. v. New Jersey Dept. of Environmental Protection*, 965 F.2d 1287, 1295 (3rd Cir. 1992)).

In adopting the reformulation of the law suggested by the above-cited commentators, the Seventh and Third

Circuits have departed markedly from established precedent. Numerous decisions of this Court and various courts of appeals hold that there are only two categories of cases for Commerce Clause purposes. Under the two-prong approach, ordinances that discriminate in any way against interstate commerce, whether on their face or in their effect, are subject to the higher scrutiny test of *Philadelphia v. New Jersey*, 437 U.S. 617 (1978), and are, therefore, virtually per se unconstitutional. The remaining ordinances—those that do not discriminate against but nonetheless impact interstate commerce—are reviewed under the *Pike* balancing test.

By its express terms, the *Pike* test applies to laws that regulate "evenhandedly"—in other words, laws that do *not* discriminate against interstate commerce:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it can be promoted as well with a lesser impact on interstate activities.

Id. at 142.

Since 1970, the *Pike* balancing test has served as the standard for dormant Commerce Clause jurisprudence involving challenged ordinances that do *not* discriminate against interstate commerce. For example, in *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981), this Court applied the *Pike* balancing test in evaluating the constitutionality of a nondiscriminatory statute banning

the retail sale of milk in certain plastic containers. Noting that the applicable constitutional analysis depended on whether the challenged regulation was discriminatory or evenhanded in its application, this Court stated:

> Since the statute does not discriminate between interstate and intrastate commerce, the controlling question is whether the incidental burden imposed on interstate commerce by the Minnesota Act is clearly excessive in relation to the putative local benefits. *Pike v. Bruce Church, Inc.*, supra, at 142.

Id. at 472. Thus, this Court applied *Pike* to a statute that did not discriminate against interstate commerce.

In two recent decisions, this Court reaffirmed the use of a two-part standard for Commerce Clause analysis, not the type of three-part analysis employed by the Seventh and Third Circuits. In *Oregon Waste Systems, Inc. v. Department of Environmental Quality of the State of Oregon*, 114 S. Ct. 1345, 1348 (1994), this Court addressed whether Oregon's surcharge on the in-state disposal of solid waste generated in other states violated the Commerce Clause. The majority opinion outlined the two accepted classifications of ordinances challenged under the Commerce Clause:

> [T]he first step in analyzing any law subject to judicial scrutiny under the negative Commerce Clause is to determine whether it regulates evenhandedly with only incidental effects on interstate commerce, or discriminates against interstate commerce. If a restriction on commerce is discriminatory, it is virtually per se invalid. By contrast, nondiscriminatory regulations that have only incidental effects on interstate commerce are valid unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

Id. at 1350 (citations omitted).

On the heels of *Oregon Waste Systems*, this Court further expounded upon the appropriate Commerce Clause analyses in *C&A Carbone, Inc. v. Town of Clarkston, New York*, 114 S. Ct. 1677 (1994). In *C&A Carbone*, this Court addressed the constitutionality of an ordinance which required all solid waste within Clarkston, New York to be processed at a designated transfer station before leaving Clarkston. The majority held that the ordinance was discriminatory in its effect and thus per se unconstitutional. *Id.* at 1682-84. The majority succinctly outlined the two possible analyses to determine whether the Commerce Clause has been violated:

> For this inquiry our case law yields two lines of analysis: first, whether the ordinance discriminates against interstate commerce and second, whether the ordinance imposes a burden on interstate commerce that is clearly excessive in relation to the putative local benefit.

Id. at 1682 (citations omitted). Finding that the challenged ordinance was discriminatory in its practical effect and design, this Court held the ordinance unconstitutional without reaching the *Pike* test. *Id.*

Justice O'Connor concurred in the majority's conclusion but did not find the ordinance discriminatory on its face or in its effect; instead, Justice O'Connor concluded that as a non-discriminatory ordinance, the ordinance was nonetheless violative of the Commerce Clause when scrutinized under the balancing test of *Pike*. *Id.* at 1687 (O'Connor, J., concurring). Like the majority, Justice O'Connor recognized the *two* analyses utilized by this Court:

> We have generally distinguished between two types of impermissible regulations. A facially nondiscriminatory regulation supported by a legitimate state in-

> terest which incidentally burdens interstate commerce is constitutional unless the burden on interstate trade is clearly excessive in relation to the local benefits. When, however, a regulation "affirmatively" or "clearly" discriminates against interstate commerce on its face or in practical effect, it violates the Constitution unless the discrimination is demonstrably justified by a valid factor unrelated to protectionism.

Id. at 1688 (O'Connor, J., concurring) (citations omitted). In emphasizing that the absence of a discriminatory intent or effect does *not* end Commerce Clause analysis, Justice O'Connor stated:

> That the ordinance does not discriminate against interstate commerce does not, however, end the Commerce Clause inquiry. Even a nondiscriminatory regulation may nonetheless impose an excessive burden on interstate trade when considered in relation to the local benefits conferred. Indeed, we have long recognized that the burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to . . . the people of the State enacting such statute.

Id. at 1689 (O'Connor, J., concurring) (citations omitted). Thus, in two cases decided in 1994, this Court explained that the *Pike* balancing test applies when the challenged ordinance does *not* discriminate against interstate commerce.

Not only do the Seventh and Third Circuit cases conflict with decisions of this Court, but they also are contrary to holdings of other courts of appeals. Like this Court, these other courts of appeals have determined that a per se test is used when an ordinance discriminates on its face or in its effect and the *Pike* balancing test is used when discrimination is absent: *Fireside Nis-*

san, Inc. v. Fanning, 30 F.3d 206, 214 (1st Cir. 1994) (in the absence of a purpose or effect of discrimination, a law will be analyzed under a balancing test); *New York State Trawlers Ass'n v. Jorling*, 16 F.3d 1303, 1307-08 (2d Cir. 1994) (a statute that regulates evenhandedly must be analyzed under *Pike*); *Medigen of Kentucky, Inc. v. Public Service Commission of West Virginia*, 985 F.2d 164, 166 (4th Cir. 1993) (*Pike* test applicable when challenged ordinance does not discriminate); *Cooper v. McBeath*, 11 F.3d 547, 553 (5th Cir.), *cert. denied*, 114 S. Ct. 2675 (1994) (a statute that regulates evenhandedly is assessed under the *Pike* balancing test); *SDDS, Inc. v. State of South Dakota*, 47 F.3d 263, 267-68 (8th Cir. 1995) (*Pike* applicable when challenged law does not discriminate against interstate commerce on its face or in its effect); *Barber v. State of Hawaii*, 42 F.3d 1185, 1194 (9th Cir. 1994) (two-tier approach to Commerce Clause cases invokes the *Pike* test when challenged regulation does not discriminate against interstate commerce); *Blue Circle Cement, Inc. v. Board of County Commissioners of the County of Rogers*, 27 F.3d 1499, 1512 (10th Cir. 1994) (*Pike* test applies specifically when the challenged ordinance does not discriminate facially or in effect); *Diamond Waste, Inc. v. Monroe County, Ga.*, 939 F.2d 941, 944-945 (11th Cir. 1991) (*Pike* test applies when ordinance does not discriminate).

The conflict between the above-cited cases and the type of analysis adopted by the Seventh and Third Circuits was acknowledged by the district court in *Sherwin-Williams Co. v. City and County of San Francisco*, 857 F. Supp. 1355 (N.D. Cal. 1994). In *Sherwin-Williams*, San Francisco enacted a lock-up ordinance in 1993 requiring retail sellers of spray paint and markers to store those items in an area that was not accessible to customers

without employee assistance. The lock-up ordinance was challenged as a violation of the Commerce Clause. After a four-day trial, the district court found that the lock-up ordinance was constitutional. *Id.* at 1358.

The ultimate result, however, was a product of the district court's application of the *Pike* balancing test. Noting that the lock-up ordinance applied evenhandedly but nonetheless posed incidental burdens on interstate commerce, the district court relied upon the *Pike* test to determine whether the ordinance's burdens on interstate commerce were clearly excessive in relation to the putative local benefits. *Id.* at 1365-66. In invoking *Pike*, the district court expressly rejected an argument that mirrors the decision of the Seventh Circuit that nondiscriminatory regulations are essentially outside of Commerce Clause protection:

> Some recent case law suggests that a court's commerce clause analysis should end once it concludes that the challenged legislation impacts intrastate and interstate commerce identically and the particular means chosen to achieve the legislation's goals are not wholly arbitrary. The greater weight of legal authority, however, dictates further analysis by this Court to ascertain whether the burden the Ordinance imposes on interstate commerce is clearly excessive in relation to the putative local benefits.

Id. at 1366.

Petitioners believe that the Seventh and Third Circuits' new approach to Commerce Clause cases is plainly inconsistent with the unambiguous and historical role of the *Pike* test in evaluating nondiscriminatory regulations. However, regardless of whether the petitioners are correct concerning the proper application of the *Pike* test, the petitioners respectfully suggest that this Court, and

not the Seventh or Third Circuit, is responsible for bringing about a significant change in Commerce Clause jurisprudence that has very real and far-reaching effects.

In this case alone, millions of dollars of interstate commerce rest on a decision by this Court. As adduced at trial, the ban on spray paint sales in Chicago will result in millions of dollars of lost interstate commerce. Moreover, the entire spray paint industry would be decimated if states and large municipalities enact similar sales bans, a very real possibility. Beyond spray paint, the list of everyday household or personal products that are capable of misuse and thus subject to a sales ban are limited only by one's imagination. Given the clear and uncontested factual record and the significant ramifications arising from the sales ban, this case presents a perfect vehicle for this Court to clarify critical constitutional issues and to resolve the undeniable conflict surrounding those issues.

II. The Decision Below Is in Direct Conflict with Decisions of This Court and Other Courts of Appeals as to Whether the District Court Can Conduct an Evidentiary Hearing under Pike.

Having adopted a three-prong approach to Commerce Clause analysis, the majority below also departed from numerous decisions of this Court and several courts of appeals in concluding that the district court is precluded, except in rare instances, from conducting an evidentiary hearing when weighing the burden imposed on interstate commerce versus the putative benefits of the ordinance. In contrast, the concurrence argued that once *Pike* was invoked, an evidentiary hearing was not only appropriate but possibly mandatory:

> And once that test [*Pike*] has been activated, it seems to me that the questions it poses may only be answered by some form of evidentiary hearing.

(App. 1, pp. 16-17). The concurrence went on to note that this Court has consistently authorized judicial fact-finding under *Pike*. (App. 1, p. 17).

The concurrence's observation concerning this Court's precedent is well-supported. For example, in *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429 (1978), the state of Wisconsin enacted nondiscriminatory regulations generally precluding the operation of trucks longer than 55 feet on Wisconsin highways. *Id.* at 432. The regulations were challenged by several interstate trucking firms as an unconstitutional burden on interstate commerce. *Id.* at 435. A three-judge panel of the district court conducted a trial at which Wisconsin asserted that its regulations to preclude longer trucks were justified for safety reasons. *Id.* at 436. In contrast, the trucking companies presented considerable (and uncontroverted) evidence that trucks longer than 55 feet were as safe as trucks 55 feet or shorter. *Id.* at 436. The trucking companies also presented uncontroverted evidence that their operations were disrupted, their costs increased, and their service slowed by Wisconsin's regulations. *Id.* at 438. After considering the evidence, the district court, in a decision that is consistent with the decision below, refused to find the regulations unconstitutional, because the length of trucks had some relation to safety and the detriments to the trucking companies were inconsequential. *Id.* at 439.

In reversing the three-judge district court and holding the regulations unconstitutional, this Court focused on the factual record that demonstrated that the regulations would not achieve their purported safety objectives:

> Despite the strength of this presumption [deference to legislature], we are persuaded by the record in this case that the challenged regulations unconstitutionally burden interstate commerce. As we have shown, appellants produced a massive array of evidence to disprove the State's assertion that the regulations make some contribution to highway safety. The State, for its part, virtually defaulted in its defense of the regulations as a safety measure.

Id. at 444.

In closing, this Court noted: "Commerce Clause adjudication must depend in large part upon the thoroughness with which the lawyers perform their task in the conduct of constitutional litigation. Here, as in many other fields, *constitutionality is conditioned upon the facts*, and to the lawyers the courts are entitled to look for garnering and presenting the facts. *Id.* at 447-48 n.25 (emphasis added) (*citing* Dowling, *Interstate Commerce and State Power*, 27 Va. L. Rev. 1, 27-28 (1940)).

This Court reached a similar result in *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981), where it affirmed the district court's finding after a 14-day trial that Iowa's nondiscriminatory regulations generally prohibiting the use of trucks beyond 55 feet were unconstitutional. Having held that the *Pike* balancing test was applicable, the plurality examined the extensive evidence relied upon by the district court and agreed with the district court that the trucking companies' evidence far outweighed the extensive, but unpersuasive, evidence presented by Iowa. *Id.* at 671-678.

In *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981), this Court similarly relied upon factual evidence in applying the *Pike* balancing test to a Minnesota regulation that prohibited the use of certain plastic milk

cartons. In particular, this Court specifically cited the trial testimony of the chairman of one of the dairies that challenged the regulation indicating that the dairy would not be impeded in selling milk in or out of Minnesota. *Id.* at 472 n.16. Although application of the *Pike* test resulted in a different ultimate conclusion than in *Raymond* or *Kassel*, the ability of the trial court to conduct an evidentiary hearing when applying the *Pike* test was not limited.

More recently, the Tenth Circuit came to a similar conclusion in *Blue Circle Cement, Inc. v. Board of County Commissioners of the County of Rogers*, 27 F.3d 1499 (10th Cir. 1994). In that case, Rogers County, Oklahoma enacted an ordinance that effectively banned the use of Hazardous Waste Fuels ("HWFs") in the county. Blue Circle Cement desired to use HWFs at its Rogers County quarry and cement plant and challenged the ordinance barring the use of HWFs as a violation of the Commerce Clause. *Id.* at 1501-1502. On the eve of a scheduled trial, the district court granted summary judgment to Rogers County. *Id.* at 1502. The district court ruled that the ordinance was "devoid of economic animus toward out-of-state interests" and thus did not violate the Commerce Clause. *Id.* at 1510.

On appeal, the Tenth Circuit reversed, holding that summary judgment was inappropriate. After noting that the mere incantation of a purpose to promote the public health or safety does not insulate a state law from Commerce Clause attack, the Tenth Circuit held that the constitutional issues merited an evidentiary hearing:

> Here, there is no evidence that the HWFs that Blue Circle proposes to burn or the byproduct of combustion of such HWFs, would present any significant

> health or safety hazard. There is no evidence that the Ordinance's requirements are related in any reasonable way to any hazard that the HWFs might present. And, there is no evidence whether the county's local interest could be promoted as well in other ways with a lesser impact on interstate activity. Blue Circle represents, and the board does not refute, that it presented evidence that the ordinance's site requirements are excessive in relation to the putative local benefits. Not only did the Court apparently fail to consider this evidence, but it also did not address the other factors in the *Pike* balancing test.

Id. at 1512.

The district court in the *Sherwin-Williams* case, discussed previously, came to the same conclusion. 857 F. Supp. 1355 (N.D. Cal. 1994). In applying the *Pike* test, the district court conducted an evidentiary hearing and relied upon voluminous written testimony submitted by the parties. *Id.* at 1358. Thus, the *Sherwin-Williams* court and the district court in the present case both received factual evidence in reviewing the respective ordinances under the *Pike* test.[6]

Thus, this Court and several lower courts have recognized that a district court can and should conduct an evidentiary hearing when applying the *Pike* balancing test. The decision of the Seventh Circuit, however, does not agree with this premise. This conflict, so aptly empha-

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[6] In noting the discrepancy between its decision and the district court's decision in this case, the district court in *Sherwin-Williams* expressly noted that the facts presented in each case differed significantly. *Id.* at 1370 n.18. In particular, the district court stressed that the burdens imposed on interstate commerce by Chicago's ban on the retail sale of spray paint were considerably more significant than the burdens imposed by San Francisco's lock-up ordinance. *Id.* at 1370 n.18.

sized in the concurring opinion in this case, demands resolution from this Court. Although this case alone involves millions of dollars of lost interstate commerce, almost any household product could face legislative extinction because of misuse or abuse. The implications of this case, therefore, are sweeping.

CONCLUSION

For the foregoing reasons, the petitioners respectfully request that this Court grant certiorari.

Respectfully submitted,

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APPENDIX 1

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 93-3969

NATIONAL PAINT & COATINGS ASSOCIATION, *et al.*,

Plaintiffs-Appellees,

v.

CITY OF CHICAGO,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 92 C 4023—**Marvin E. Aspen**, *Judge.*

ARGUED NOVEMBER 28, 1994—DECIDED JANUARY 24, 1995

Before EASTERBROOK, MANION, and ROVNER, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* Graffiti cover more than five million square feet of walls, signs, windows, and other public surfaces in Chicago. Full-time crews patrol the streets removing paint, but they are losing ground. Vandalism and trespass are crimes, but prosecution has not sufficed. In May 1992 Chicago decided to do something more: to lump spray paint and jumbo markers, the principal tools of the graffiti "artist," with burglars' tools and other criminal implements as contraband. An ordinance forbids the sale of spray paint and jumbo indelible markers (collectively spray paint) within the city limits. Chicago Municipal Code §4-132-150 (1992). The fine for each violation: $100.

I

Plaintiffs in this suit, a consortium of makers, wholesalers, and retailers of paint and markers, contend that this ordinance and a related law enacted at the same time exceed Chicago's home-rule powers under Illinois law and violate the Constitution of the United States to boot. Over the objection of the City, the district court held a trial and concluded, after hearing evidence for six days, that a ban will not work. 835 F. Supp. 421 (N.D. Ill. 1993). The court found that the vandals live, eat, and breathe graffiti, that they are so committed to producing narcissistic displays that they are undeterrable—not by fines, anyway. Although the law will dry up the supply of spray paint at retail outlets in Chicago, the vandals can obtain their needs in the suburbs and continue their rampage. Another ordinance forbids the possession of spray paint "on the property of another" or in any public building or facility. Chicago Municipal Code §8-4-130(a). Although the plaintiffs no longer challenge this law (the district court held that they lack standing to do so), the judge believed that even the combination of a ban on sales and a severe restriction on possession would fail. Because the ordinances will not work, they are, the court believed, unconstitutional—for it is irrational to deprive the law-abiding 99% of spray paint users of a substance for which they have productive uses when the deprivation does not accomplish anything. The district court concluded that the ban on sales therefore violates the dormant commerce clause and principles of substantive due process, and that it also exceeds Chicago's home-rule powers. It enjoined enforcement of the ordinance. The injunction has remained in effect pending appeal.

The district court treated the extent of the City's powers as an afterthought, mentioning the subject (and holding the ordinance invalid on this basis) only after considering and resolving both of plaintiffs' constitutional claims. 835 F. Supp. at 434-35. Yet if a sufficient non-constitutional ground of decision is available, a court must begin *and end* there. *New York City Transit Authority v. Beazer*,

440 U.S. 568, 582-83 (1979). Constitutional adjudication is a last resort, and courts should do what they can to decide on other grounds. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501 (1985); *Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944). As it turns out, however, the City's home-rule powers are quite sufficient to enact this ordinance. A home-rule unit in Illinois may "regulate for the protection of the public health, safety, morals and welfare". Ill. Const. art. VII §6(a). This "provision was written with the intention that home-rule units be given the broadest powers possible." *Scadron v. Des Plaines*, 153 Ill. 2d 164, 174, 606 N.E.2d 1154, 1158 (1992). See also, e.g., *Bolingbrook v. Citizens Utilities Co.*, 158 Ill. 2d 133, 632 N.E.2d 1000 (1994). Some state cases contain stray language implying that courts may assess the wisdom of legislation, e.g., *Crocker v. Finley*, 99 Ill. 2d 444, 457, 459 N.E.2d 1346, 1352 (1984), but in the main the Supreme Court of Illinois has permitted cities the same leeway the Supreme Court of the United States affords to the states. E.g, *Triple A Services, Inc. v. Rice*, 131 Ill. 2d 217, 227-34, 545 N.E.2d 706, 711-13 (1989); *Cutinello v. Whitley*, 161 Ill. 2d 409, 421-22, 641 N.E.2d 360, 364-65 (1994). The district court's conclusion was parasitic on its constitutional holding: it reasoned that cities lack authority to enact irrational laws. Whether that is so as a matter of Illinois law does not matter; it is plain that the home-rule question is not an *independent* state ground of decision, and we therefore turn to the constitutional claims.

II

Are the benefits of spray paint worth the costs in defacement of property by vandals? Will limits on the sale and possession of spray paint reduce graffiti by enough to justify the inconvenience they create for those who use the product without harming others? Will the vandals find an adequate supply in the suburbs or perhaps turn to substitutes such as automotive undercoating? These are important questions, but the Constitution commits their decision to the political branches of government. The power

to decide, to be wrong as well as to be right on contestable issues, is both privilege and curse of democracy.

Not willing to accept the legislative answer to these questions, the district judge took evidence and gave his own answers. Chicago does not contend that the judge's answers are wrong; instead it contends that they are irrelevant, because holding the trial in the first place usurped the legislative power. Indeed so: a legislative decision "is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." *FCC v. Beach Communications, Inc.*, 113 S. Ct. 2096, 2102 (1993). See also, e.g., *Nordlinger v. Hahn*, 112 S. Ct. 2326, 2334 (1992); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463-65 (1981); *Vance v. Bradley*, 440 U.S. 93, 111 (1979). "[R]ational-basis review in equal protection analysis 'is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.' " *Heller v. Doe*, 113 S. Ct. 2637, 2642 (1993) (citations omitted). Even in litigation about torts and contracts, a court holds evidentiary hearings only when necessary to resolve material disputes of fact. In constitutional law, to say that such a dispute exists—indeed, to say that one may be *imagined*—is to require a decision for the state. Outside the realm of "heightened scrutiny" there is therefore never a role for evidentiary proceedings. By holding a trial, the district court conceded that there were material factual disputes—as there were. Two respected economists testified that the ordinance effectively raises the price of spray paint in Chicago, leading to a reduction in its use. How *much* of a reduction was hotly disputed, but no one can doubt that thoughtful people could conclude that there will be *some* reduction. See *44 Liquormart, Inc. v. Rhode Island*, 39 F.3d 5, 7-8 (1st Cir. 1994). The district court therefore should not have conducted a trial, and we disregard its conclusions.

A person challenging the regulation of economic transactions must "negative every conceivable basis which might support" the rule. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973) (citation omitted). Chicago

offers a "conceivable basis"—that is to say, a rational argument—for its law. Reducing the availability of spray paint has a tendency to reduce its use. Raising the price of spray paint has a similar tendency. The combination of the travel costs to procure spray paint from the suburbs, plus a fine when one is caught red-handed with a can, is the functional equivalent of a price increase. It may be, as the district court believed, that the taggers (as the vandals call themselves) are committed to graffiti as a way of life, but this affects only the degree to which the statute will be effective. Actually, the statute may have a substantial effect even if the district court is right about the degree of taggers' commitment to their pastime. Persons who are already taggers may not change their behavior much, but it will become harder to recruit new taggers, and some taggers will leave the lifestyle sooner. The district court found that persons between the ages of 12 and 20 commit almost all of the graffiti vandalism; if the law restricts the age range to 13-19 it will have benefits even if none of the practicing taggers reduces his "output."

What is more, a legislature rationally may conclude that even the most committed of taggers will alter his behavior. That fines and other criminal punishments deter misconduct is a rational belief backed up by a significant body of evidence. See *United States v. Turner*, 998 F.2d 534, 536-37 (7th Cir. 1993) (collecting studies). When prices of normal goods rise, people consume less. There are even constitutional doctrines based on this—consider, for example, the understanding that license fees and the risk of tort judgments "chill" speech. E.g., *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 794-95 (1988). How legislation based on the proposition can be "irrational" eludes us. The district judge treated the taggers as if they were addicts and deemed them immune from economic incentives. It turns out, however, that consumption of addictive substances follows normal economic principles. Take cigarettes. Smokers turn out to be highly responsive to information about health

risks. W. Kip Viscusi, *Smoking: Making the Risky Decision* (1992). A reduction in health and an increase in health care expenditures are equivalent to a higher (but deferred) price. Cigarette smoking is quite responsive to changes in explicit prices, too. See Gary S. Becker, Michael Grossman & Kevin M. Murphy, *An Empirical Analysis of Cigarette Addiction*, 84 Am. Econ. Rev. 396 (1994) (elasticity of about 0.75 for long-run change in cigarette prices). Yet one could have said about smokers the same things the district judge said about taggers. Because addicts, criminals, and the like respond to incentives, a legislature rationally may attempt to influence them by changing prices and penalties.

Availability of spray paint in the suburbs, and of undercoating in Chicago, reduces the effectiveness of the statute, but a rational legislature could conclude that some effect remains. Many persons believe that restrictions on guns, fireworks, and liquor (to name only three of the hazardous products that local governments regulate) are defeated by movements from unregulated jurisdictions. Yet people of good will (and possessed of ample information) debate the extent of this effect; the existence of the debate establishes that the Constitution does not dictate the outcome. Legislatures often enact laws that reduce but cannot eliminate the effects of movements across municipal and state borders. For example, Congress has forbidden radio and television stations with broadcast facilities in states that do not conduct lotteries to broadcast lottery ads and information—even if a significant portion of their signal falls in lottery states, and even if the nonlottery states are flooded by lottery ads and information broadcast from the neighboring lottery states. A judge concluded that this law is irrational because people in nonlottery states have many other ways to learn the information and buy lottery tickets, and because in the judge's view the people in lottery states should not be deprived of valuable information for such a speculative "benefit" to people in neighboring states. The Supreme Court reversed, holding that the "leakage" of information did not

render the law invalid. *United States v. Edge Broadcasting Co.*, 113 S. Ct. 2696, 2706-08 (1993). The district court's rationale in this case tracks the one the Supreme Court repudiated in *Edge Broadcasting*. If, even when speech is at stake, a legislature need not eradicate a problem to be entitled to make some progress, there can be no doubt about the power of a legislature to regulate spray paint. The district court's approach, by contrast, is hostile to all but national legislation, because movements of goods and people undercut almost all local laws. It would turn the structure of the Constitution on its head to adopt a principle that disables state and local regulation and compels the national government to take over.

It may be, as plaintiffs say, that Chicago could have taken a path that would have given more leeway to those who use spray paint constructively. San Francisco restricts the availability of spray paint along the lines of prescription drugs. See *Sherwin-Williams Co. v. San Francisco*, 857 F. Supp. 1355 (N.D. Cal. 1994) (holding the law constitutional). A legislature need not choose the least restrictive means of regulation, however. "If there are alternative ways of solving a problem, we do not sit to determine which of them is best suited to achieve a valid state objective." *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 524 (1959).

Plaintiffs respond that this is all well and good for equal protection analysis, but they assert (and the district court held) that the ordinance is a violation of substantive due process. Now we have spent some time looking through the Constitution for the Substantive Due Process Clause without finding it. The fourteenth amendment contains an equal protection clause, and a due process clause, but no "due substance" clause. The word that follows "due" is "process." This court has held repeatedly that economic regulation must be evaluated under equal protection principles, and that laws supported by a rational basis are within the power of the elected branches of government. *River Park, Inc. v. Highland Park*, 23 F.3d 164 (7th Cir. 1994); *Saukstelis v. Chicago*, 932 F.2d 1171, 1173-74 (7th

Cir. 1991); *Chicago Board of Realtors, Inc. v. Chicago*, 819 F.2d 732, 741-42 (7th Cir. 1987). "The doctrine that . . . due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely . . . has long since been discarded." *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963).

The doctrine that goes by the name "substantive due process" is not a rival to the established rational basis analysis of economic regulation. It is instead derived from the many constitutional rules that protect personal liberty from unjustified intrusions. The fact that it is a doctrine owing its existence to constitutional structure rather than a clear grant of power to the judiciary has led the Supreme Court to be cautious in its use. *Albright v. Oliver*, 114 S. Ct. 807, 812-13 (1994) (plurality opinion); *Collins v. Harker Heights*, 112 S. Ct. 1061, 1068 (1992). Only laws that affect "fundamental rights" come within the purview of this doctrine. See *Reno v. Flores*, 113 S. Ct. 1439, 1447 (1993).

One could scan the most wild-eyed radical's list of candidates for the status of "fundamental right" without encountering spray paint. Plaintiffs point to their licenses to do business, but these are property, not "fundamental rights." Many of the cases in the equal protection canon involved licenses, without the Court so much as hinting that a special rule applied. E.g., *New Orleans v. Dukes*, 427 U.S. 297 (1976); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955). A license is nothing but a promise by the issuing body not to interfere in business conducted according to its terms. *River Park*, 23 F.3d at 166; *Toulabi v. United States*, 875 F.2d 122 (7th Cir. 1989). Not since legislatures responded to the *Dartmouth College* case by reserving the right to alter the terms of charters and licenses have courts treated them as *substantive* bars to regulation. A license, as a species of property, may require the government to afford appropriate process. But the people, directly or through their legislature, may alter the substantive terms of the promise not to interfere in private economic transactions. See *Philly's, the Original*

Philadelphia Cheese Steak, Inc. v. Byrne, 732 F.2d 87 (7th Cir. 1984) (holding that Illinois may allow each voting precinct to decide whether to permit the sale of liquor, even though a decision to "go dry" may extinguish rights held under licenses and even though customers may continue to buy liquor in neighboring precincts).

Plaintiffs all are corporations. Corporations do not have fundamental rights; they do not have liberty interests, period. Investors may have such rights, and inhibitions on the conduct of organizations may influence investors' and members' ability to exercise their own rights. See *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 302-10 (1964); *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). But plaintiffs do not assert that Chicago's ordinance directly or indirectly affects a fundamental right possessed by their investors. The only interest at stake is the interest in obtaining the maximum return on investment. That is not a "fundamental" right. The right of bakers to work for long hours, and thus to earn money for struggling families, is far more important to personal liberty, yet the days of *Lochner v. New York*, 198 U.S. 45 (1905), have passed. For substantive protections businesses must look to the takings clause of the Constitution, which does not forbid regulation but simply requires payment. (Plaintiffs do not contend that the ordinance takes their property without just compensation, or that it is a taking for private use.) When assessing economic regulation a court therefore must employ the rational-basis test, which Chicago's ordinance passes with room to spare.

III

Plaintiffs have a final arrow in their quiver: the commerce clause, which, although in terms a grant of power to Congress, is today understood to imply some limitation on state power. They contend, and the district court held, that even if the ordinance is rationally related to a legitimate objective, it achieves its ends at an excessive price to interstate commerce. Most of the spray paint sold

in Chicago comes from outside Illinois. This is enough, the district court held, to activate the balancing approach of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), which it understood to authorize a comprehensive review of the law's benefits, free of any obligation to accept the legislature's judgment. Having disparaged the law's benefits, the district court thought that unconstitutionality under the dormant commerce clause followed.

Several years ago we disapproved exactly this approach, remarking that the dormant commerce clause does not replace the rational-basis inquiry with a "broader, all-weather, be-reasonable vision of the Constitution. . . . Although *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), sometimes is understood to authorize such general-purpose balancing, a closer examination of the cases may support the conclusion that the Court has looked for discrimination rather than for baleful effects. See Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091 (1986); Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 Yale L.J. 425 (1982)." *Amanda Acquisition Corp. v. Universal Foods Corp.*, 877 F.2d 496, 505 (7th Cir. 1989). The district court stated that *Amanda Acquisition* does not control because *Pike* has been applied by the Supreme Court since 1989, dissipating all doubts about its validity. 803 F. Supp. 135, 142 n.4 (N.D. Ill. 1992). This misunderstands both our point in *Amanda Acquisition* and the Supreme Court's commerce clause jurisprudence, so we recapitulate. Our court has not questioned the "validity" of *Pike* (for an inferior court must apply the Supreme Court's decisions without regard to doubts about their wisdom); we were, and are, obliged to determine the proper scope of its application.

Interstate communication and transportation is pervasive. Because even "local" activities displace the movement of goods, services, funds, and people, almost every state and local law—indeed, almost every private transaction—affects interstate commerce. This is why the commerce clause authorizes Congress to regulate so many de-

tails of daily life. E.g., *Summit Health, Ltd. v. Pinhas*, 500 U.S. 332 (1991) (exclusion of a single physician from a single hospital affects interstate commerce); *Russell v. United States*, 471 U.S. 858 (1985) (arson of a two-unit apartment building affects interstate commerce); *Wickard v. Filburn*, 317 U.S. 111 (1942) (farmer's consumption of bread baked from own wheat affects interstate commerce). See also *New York v. United States*, 112 S. Ct. 2408, 2419 (1992) ("As interstate commerce has become ubiquitous, activities once considered purely local have come to have effects on the national economy, and have accordingly come within the scope of Congress' commerce power."). But see *United States v. Lopez*, 2 F.3d 1342 (5th Cir. 1993), cert. granted, 114 S. Ct. 1536 (1994) (argued Nov. 8, 1994); *United States v. Robertson*, 15 F.3d 862, 868-69 (9th Cir.), cert. granted, 115 S. Ct. 354 (1994). If the balancing approach of *Pike* supplied the standard applicable to all laws affecting commerce—that is, to all state and local laws addressing a subject that Congress *could* regulate, if it chose—then judicial review of statutory wisdom after the fashion of *Lochner* would be the norm. Not so, because *Pike* is not universally applicable. *K-S Pharmacies, Inc. v. American Home Products Corp.*, 962 F.2d 728 (7th Cir. 1992).

State and local laws affecting commerce may be put into one of three categories. (The classification of a particular law may be difficult, but that does not concern us here.) The first category comprises laws that explicitly discriminate against interstate commerce. Chicago might, for example, forbid the sale of spray paint manufactured outside Illinois. Such laws are treated as all but *per se* unconstitutional. E.g., *C&A Carbone, Inc. v. Clarkstown*, 114 S. Ct. 1677 (1994); *West Lynn Creamery, Inc. v. Healy*, 114 S. Ct. 2205 (1994). Chicago's law does not fall into this category, however; it bans all spray paint without regard to source.

The second category comprises laws that appear to be neutral among states but that bear more heavily on interstate commerce than on local commerce. One state's

law setting a 55-foot limit for trailers when all nearby states permit 65-foot trailers bears more heavily on vehicles from other states, which are limited in the places they may travel, while in-state vehicles may move freely to other states. See *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981). When the effect is powerful, acting as an embargo on interstate commerce without hindering intrastate sales, the Court treats it as equivalent to a statute discriminating in terms. See Daniel A. Farber & Robert E. Hudec, *Free Trade and the Regulatory State: A GATT's-Eye View of the Dormant Commerce Clause*, 47 Vand. L. Rev. 1401, 1411-18 (1994) (summarizing the factors that lead to this treatment). When the discriminatory effect is weak, however, the Court is more willing to entertain justifications that are unrelated to the suppression of interstate commerce. In *Pike* itself, the disparate effect was strong enough to require all cantaloupes sold in Arizona to be packed in that state, 397 U.S. at 140, yet the restriction on supply from other states was not such an apparent objective of the law that the Court ruled out all possibility of justification. Like the law in *Clover Leaf Creamery*, which barred the sale of milk in plastic nonrefillable containers, to the potential detriment of suppliers in other states that had specialized in such containers, laws with mild disparate effects and potential neutral justifications are analyzed under *Pike*, and the state must establish that reasonable persons who held all states' interests in equal regard could think that net benefits remained. See also *Government Suppliers Contracting Services, Inc. v. Bayh*, 975 F.2d 1267 (7th Cir. 1992).

If the first category may be called disparate treatment, and the second disparate impact, the third category comprises laws that affect commerce without any reallocation among jurisdictions—that do not give local firms any competitive advantage over those located elsewhere. Cases such as *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987), and *Amanda Acquisition* fit into this category, for which, we have held, the normal rational-basis standard is the governing rule. As *Exxon* remarks, "[t]he

fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of *discrimination* against interstate commerce." 437 U.S. at 126 (emphasis added). Unless the law discriminates against interstate commerce expressly or in practical effect, there is no reason to require special justification. See also *J. Filiberto Sanitation, Inc. v. New Jersey Department of Environmental Protection*, 857 F.2d 913, 919-21 (3d Cir. 1988); *Norfolk Southern Corp. v. Oberly*, 822 F.2d 388, 406 (3d Cir. 1987).

Where does Chicago's spray paint ordinance fit? If we accept the district court's findings of fact, it fits squarely in the third category—for the district court found that the law will be ineffectual, implying that it will not alter the flow of commerce at all. If, however, we assume that the law will curtail sales to law-abiding persons without affecting the vandals ("If spray paint is outlawed, only outlaws will have spray paint."), then the volume of spray paint moving into Illinois will diminish. Will this produce a relative advantage for Illinois firms (that is, will it have a disparate impact on interstate commerce)? Certainly not for Illinois retailers, who lose whatever profit spray paint yields. Given competition, this loss is not likely to be serious; retailers will earn a normal rate of return on invested capital whether or not they sell spray paint. At all events, the whole loss among retailers is felt locally. How about manufacturers and middlemen? The answer to that question depends on where consumers turn for substitutes after spray paint vanishes. The concern in cases of disparate impact is that they will turn preferentially to in-state suppliers: unable to ship in 65-foot trailers from out-of-state carriers, shippers will hire the 55-foot trailers from local firms, and so on.

To determine whether there is a disparate effect on interstate commerce, then, we need to know what consumers will replace spray paint with. A dispute between the parties on this subject might require a district court to activate its fact-finding apparatus; *Pike* may be impossible to apply without some factual inquiries (albeit limited as *Clover Leaf Creamery* requires). Yet despite the lengthy

trial the district court did not make any findings on this subject. When we inquired at oral argument, we learned the reason: plaintiffs did not offer any evidence. Apparently no one contends that substitutes for spray paint will come from inside Illinois to any greater degree than the spray paint itself does. If consumers turn to paint in cans, applied by brushes and rollers, they will obtain the product from the same firms that produce spray paint. If consumers turn to medium-sized indelible markers (those with tips smaller than 3/8″) they will find that the suppliers are the same out-of-state firms that make the jumbo variety. In sum, the ordinance affects interstate shipments, but it does not discriminate against interstate commerce in either terms or effect. No disparate treatment, no disparate impact, no problem under the dormant commerce clause. See also *Procter & Gamble Co. v. Chicago*, 509 F.2d 69 (7th Cir. 1975) (holding that Chicago's ban on the sale of detergents containing phosphates—a measure that did not give any benefit to local manufacturers—satisfied the dormant commerce clause).

Perhaps Chicago's City Council has used too broad a brush. If so, the law-abiding residents of Chicago will be the losers, for they forfeit the benefits of spray paint without enjoying much, if any, reduction in vandalism. No more than the equal protection clause does the dormant commerce clause protect people against injuring themselves by overestimating the power of law to alter human events for good. Time and again social science research teaches that laws fail to achieve their goals—that the laws provoke costly adjustments that make the majority worse off. Just as the Constitution does not enact Mr. Herbert Spencer's *Social Statics*, so it does not enact prescriptions from the pages of *The Journal of Law & Economics*—where, we may assume, an article will appear in due course adding this ordinance to the long list of laws whose costs exceed their benefits. "[A] law can be both economic folly and constitutional." *CTS*, 481 U.S. at 96-97 (Scalia, J., concurring). Chicago's law may well be folly; we are confident that it is constitutional.

REVERSED

ROVNER, *Circuit Judge*, concurring. No one can doubt that graffiti vandalism poses a serious and vexing problem for the City of Chicago and its residents. Yet, without minimizing the gravity of the problem, I must confess that I find the City's response—an outright ban on the sale of spray paint and large markers within the city limits—a bit dramatic. Under Chicago's ordinance, not only will graffiti vandals be deprived of lawful access to the tools of their trade, but so will law-abiding citizens who otherwise would have used the banned products for legitimate purposes.

Spray paint manufacturers and retailers were understandably upset by their exclusion from such a large market, and a consortium of out-of-state interests challenged the ordinance in federal court. In the course of a six-day bench trial, the parties explored at length the many vagaries of Chicago's graffiti problem and the anticipated effectiveness of the City's response. The able and experienced district judge found on the basis of the trial evidence that Chicago's ban violates the Commerce Clause because if enforced, the ordinance would substantially burden the flow of interstate commerce while furthering Chicago's purposes only marginally. From that conclusion, the court divined that the ordinance also violates principles of substantive due process and exceeds the City's home-rule powers under state law. The majority today disagrees with each of those conclusions, and in the process, chastises the lower court for conducting a trial designed to look behind Chicago's ordinance, rather than deferring to the judgment of its elected officials. I ultimately agree with my colleagues that Chicago's ban is not constitutionally infirm, but I write separately to clarify one point about the Commerce Clause and then to make two additional points about the majority's analysis.

I have no quarrel with the majority's treatment of the City's home-rule powers, as I agree that home-rule units have broad powers under the Illinois Constitution and that courts should second-guess the exercise of those powers by elected officials only in the most extreme cases. Al-

though this may seem to some to be an extreme case, the problem of graffiti vandalism is a difficult one, and I agree that Chicago had the power to respond as it did.

I also commend the majority for its thorough and helpful treatment of what I see as the primary issue in this appeal—whether the resale ban violates the dormant Commerce Clause. *See ante* at 9-14. I agree that this case falls into the last of the majority's three categories (*ante* at 13-14) and that it resembles the legislation at issue in such cases as *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), and *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987). Although Chicago's ban on the sale of spray paint and large markers may impact the free flow of commerce amongst the states, it does so in a non-discriminatory fashion, both by its terms and in its effects. Plaintiffs never alleged, for instance, that in the face of this ban, Chicago consumers would turn to alternate products produced primarily in Chicago or the State of Illinois. Had they done so, their allegations in all likelihood would have activated the balancing test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970):

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

(Citations omitted.) And once that test has been activated, it seems to me that the questions it poses may only be answered by some form of evidentiary hearing.

My colleagues decree that the district court should have refrained from conducting a trial because reasonable minds could differ about the potential effects of the resale ban.

Ante at 4. That may be true solely as a matter of substantive due process, but it is not necessarily the case under the dormant Commerce Clause. If a plaintiff's allegations are sufficient to establish that a facially neutral ordinance may have a discriminatory impact—that is, that it may have an incidental effect on interstate commerce—then *Pike*'s balancing test applies, and the district court may conduct evidentiary proceedings and even a trial to test the actual benefits and burdens of the legislation, regardless of what a reasonable legislator may have believed. It may consider as well whether the legislature's purpose might be achieved by some means having a lesser impact on interstate commerce. Indeed, that is how the Supreme Court has consistently understood *Pike*. *See, e.g.*, *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981) (reviewing evidence adduced in fourteen-day trial addressed to the benefits and burdens of state legislation); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 470-74 (1981) (reviewing evidence adduced in extensive evidentiary hearings under *Pike*); *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 444 (1978) (invalidating state regulation under *Pike* based upon the plaintiff's "massive array of evidence" which disproved the regulation's alleged benefit). A district court would not, in such a case, overstep its bounds by second-guessing the policy judgments of elected officials. It instead would act in the limited fashion envisioned by *Pike* to preserve the integrity of our interstate system of commerce.

Here, then, the district court erred not so much in deciding to conduct a trial, as the majority implies, but in deciding that *Pike* applies to Chicago's ordinance in the first place.[1] Had that decision been correct, the trial below would have been entirely appropriate. Yet, because plaintiffs never alleged that Chicago's ordinance discriminates

[1] Perhaps the court was influenced by the City's apparent concession for purposes of its motion to dismiss that the *Pike* balancing test applied. *See National Paint & Coatings Ass'n v. City of Chicago*, 803 F. Supp. 135, 142 & n.4 (N.D. Ill. 1992).

against interstate commerce in any way, *Pike* was never activated, and a trial was therefore unnecessary.

The district court also found that Chicago's resale ban violates principles of substantive due process. I can agree that this doctrine has only a limited role to play in the constitutional analysis of state and local regulation and that it certainly is not violated by Chicago's ban on the retail sale of spray paint and large markers. *See ante* at 8. Yet even so, I do not believe that as an intermediate appellate court we are at liberty to continue to question the very existence of the doctrine. *See id.* at 7; *see also Saukstelis v. City of Chicago*, 932 F.2d 1171, 1173 & n.* (7th Cir. 1991). The Supreme Court has adhered to its substantive due process jurisprudence in a number of recent decisions, and that, to my mind, is the end of the matter. *See, e.g., Reno v. Flores*, 113 S. Ct. 1439, 1447 (1993); *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2804-07 (1992); *Collins v. City of Harker Heights, Texas*, 112 S. Ct. 1061, 1068 (1992).

Finally, I find it curious that the majority thinks it necessary to assess Chicago's ordinance under the Equal Protection Clause, as my colleagues apparently recognize that no equal protection claim has been advanced in this appeal. *See ante* at 7. The district court did not invalidate Chicago's ordinance under the Equal Protection Clause, and such a claim thus was not briefed to this court. I would therefore refrain from any comment on the viability of an equal protection claim in this context.

With these qualifications, I concur in the reversal of the district court's judgment.

A true Copy:

Teste: _____

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: January 24, 1995

BEFORE:

Honorable FRANK H. EASTERBROOK, Circuit Judge
Honorable DANIEL A. MANION, Circuit Judge
Honorable ILANA DIAMOND ROVNER, Circuit Judge

No. 93-3969

NATIONAL PAINT & COATINGS ASSOCIATION, RUST-OLEUM CORPORATION, an Illinois Corporation, SHERWIN-WILLIAMS COMPANY, an Ohio Corporation, et al.,

Plaintiffs-Appellees

v.

CITY OF CHICAGO, an Illinois municipal corporation,

Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 92 C 4023, Marvin E. Aspen, Judge

The judgment of the District Court is REVERSED, with costs, in accordance with the decision of this court entered on this date.

APPENDIX 2

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NATIONAL PAINT & COATINGS ASSOCIATION; RUST-OLEUM CORPORATION, an Illinois corporation; THE SHERWIN-WILLIAMS COMPANY, an Ohio corporation; ACE HARDWARE CORPORATION, a Delaware corporation; TRU-TEST MANUFACTURING COMPANY, a Delaware corporation; FMA INC., d/b/a JIM'S ACE HARDWARE, an Illinois corporation; W.C. SCHAUER HARDWARE CENTER, INC., an Illinois corporation; SMILEY ACE HARDWARE, INC., an Illinois corporation, Plaintiffs,	)	
v.	)	Case No. 92 C 4023
CITY OF CHICAGO, an Illinois municipal corporation, Defendant.	)	

MEMORANDUM OPINION AND ORDER

MARVIN E. ASPEN, District Judge:

In response to the growing problem of graffiti in Chicago, on May 20, 1992, the City Counsel of the City of Chicago enacted four ordinances, Municipal Code §§ 4-132-150, 8-4-130, 8-16-095 and 8-16-096, regulating the sale and possession of paint in spray cans ("spray paint") and markers containing a non-water soluble fluid and having a writing surface of 3/8 of an inch or greater

("large markers"). Plaintiffs,[1] seeking declaratory and injunctive relief, challenge the constitutionality of §§ 4-132-150 and 8-4-130(a).[2]

In a memorandum opinion and order dated July 31, 1992, we narrowed plaintiffs' challenge to the following issues: (1) whether §§ 4-132-150 and 8-4-130(a) impose an impermissible burden on interstate commerce; (2) whether §§ 4-132-150 and 8-4-130(a) violate plaintiffs' right to substantive due process as guaranteed under the United States Constitution; and (3) whether §§ 4-132-150 and 8-4-130(a) constitute an illegitimate exercise of the

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[1] Initially, plaintiffs consisted of the following manufacturers, transporters, retail sellers and consumers of spray paint and large markers: (1) National Paint Coatings Association; (2) Rust-Oleum Corporation; (3) The Sherwin-Williams Company; (4) Ace Hardware Corporation; (5) Tru-Test Manufacturing Company; (6) FMA Inc., d/b/a Jim's Ace Hardware; (7) W.C. Schauer Hardware Center, Inc.; (8) Elston Ace Hardware, Inc.; (9) Smiley Ace Hardware, Inc.; (10) The Art & Craft Materials Institute; (11) Brudno Art Supply Store Co.; (12) Sakura Color Products of America; (13) Peter Michael O'Brien; and (14) Kirby J. Briske. On March 19, 1993, we afforded plaintiffs Elston Ace Hardware, The Art & Craft Materials Institute, Brudno Art Supply Store Co., Sakura Color Products of America, Peter Michael O'Brien and Kirby J. Briske voluntary dismissal without prejudice. For the sake of convenience, we will refer collectively to the remaining eight entities as "plaintiffs."

[2] Although § 8-4-130 consists of two subsections, plaintiffs do not challenge the constitutionality of § 8-4-130(b), which prohibits the possession of spray paint and large markers "on the public way with the intent to use the same to deface any building, structure or property." *See* Complaint ¶ 3, at 3. Likewise, plaintiffs do not challenge the validity of § 8-16-095, which prohibits minors from possessing spray paint and large markers, nor do they challenge § 8-16-096, which prohibits aiding and abetting minors in obtaining possession of such items. *Id.*

police power afforded the City of Chicago under the Illinois Constitution. *National Paint & Coatings Ass'n v. City of Chicago*, 803 F. Supp. 135, 149 (N.D. Ill. 1992). In conjunction with the above listed issues, the court conducted a bench trial, which began on July 15, 1993 and, after six days of testimony, concluded on August 2, 1993. After a careful review of the evidence presented at trial, both oral and written, the various trial exhibits, all relevant pleadings and memoranda of law, we issue the following findings of fact and conclusions of law.

I. FINDINGS OF FACT

A. The Challenged Ordinances

1. Section 4-132-150 of the Municipal Code, as amended on May 20, 1992, prohibits the retail sale of spray paint and large markers in the City of Chicago. That provision provides:

> It shall be unlawful for any person holding a retail business license to sell paint in spray cans to any person or to sell any marker containing a fluid which is not water soluble and has a point, brush, applicator or other writing surface of three-eights of an inch or greater to any person.

Municipal Code of Chicago, § 4-132-150. "Any person found in violation of Section 4-132-150 shall be fined not less than nor more than $100.00 and/or required to perform reasonable public service for each separate offense." *Id.* § 4-132-170.

2. Section 8-4-130(a) prohibits the possession of spray paint and large markers in Chicago's public buildings, public facilities or on the property of another:

> (a) It shall be unlawful for any person to possess a spray paint container, liquid paint or any marker containing a fluid which is not water soluble and has a point, brush, applicator or other writing surface of three-eighths of an inch or greater, on the property of another or in any public building or upon any public facility. It shall be a defense to an action for violation of this subsection that the owner, manager or other person having control of the property, building or facility consented to the presence of the paint or marker.

Municipal Code of Chicago, § 8-4-130(a). Notably, if enforced as written, the ordinance will result in the arrest and prosecution of adults who possess spray paint, liquid paint or any large marker on the property of another, in any public building or upon any public facility regardless of the individual's intent to commit graffiti vandalism. Although some of these adults may eventually prevail under the defense provided for those with the consent of the owner, manager or other person controlling the property, such defense does not guarantee that these individuals will not be arrested and prosecuted in the first instance. The penalty for violating this provision is a fine not to exceed $200. *Id.* § 8-4-360.

B. Defining "Graffiti Vandalism"

3. Although listed as a contested issue in this case, the parties have agreed upon the following broad definition of "graffiti vandalism": "marks placed on property without the owner's consent." Final Pretrial Order, Exhibit L-1 ¶ 51 & Exhibit L-2 ¶ 51. Despite the City's acquiescence to plaintiffs' proffered definition, however, it is evident that such a definition is far too overinclusive to be helpful to the present inquiry. Consider, for in-

stance, the following scenario. Upon completion of a stressful work day, a co-worker invites you to join her for dinner and, so as not to offend her, you accept. As your co-worker's apartment is only four blocks from the office, you decide to get a little exercise and walk. Unfortunately, on the way over it begins to rain and, being completely unprepared, you become wet and muddy. As you arrive at your co-worker's apartment, you are so eager to enter a warm and dry room that you forget to take off your shoes and, hence, leave a muddy footprint on your co-worker's new carpet without permission. Fairly, such an incident cannot even be labelled vandalism, yet under the above definition, the footprint left on the carpet would be considered "graffiti." To further the point, consider a tire mark left by a person who purposefully drives over another's lawn without permission. While certainly an act of vandalism, all parties can agree that such conduct is not "graffiti" as it concerns this case.

4. No single formulation of the term can adequately encompass the common notion held by the court and the respective parties of what constitutes "graffiti." Nonetheless, we believe that an accurate description must provide that "graffiti" is in fact intended as an expression of ideas, information and culture, as opposed to a product of carelessness and neglect. As important, who creates "graffiti" and how it is applied sheds considerable light on our efforts to initially identify "graffiti." In light of these considerations, which are discussed in detail below, and to aid in our present inquiry, we offer the following definition: "graffiti" refers to "an inscription, drawing or design scratched, painted, sprayed or placed without the consent of the owner on a surface so as to be seen by the public."

C. The Magnitude of the Graffiti Problem in Chicago

5. At the outset, we note that plaintiffs do not dispute that graffiti is a serious problem. It is present on property in all 50 wards in Chicago. Final Pretrial Order, Exhibit A ¶¶ 6-7. Further, no type of property has been spared. Upon walking through the streets in Chicago, one can find graffiti on homes, garages, roof tops, mailboxes, libraries, churches and synagogues, public sculptures, park benches, buses, trains, tree trunks, sidewalks and virtually any other type of property present in the City. *See* Plaintiffs' Trial Exhibits 38-46, 85, 95; Defendant's Trial Exhibits 8, 19, 26, 70, 72, 74, 76, 79, 84, 86, 88. Indeed, according to one of plaintiffs' expert witnesses, Jay Beswick, over 5,000,000 square feet in Chicago is covered with graffiti. R445.

6. The costs associated with graffiti vandalism are substantial to both public and private sectors. The City, along with various public agencies, including the Chicago Transit Authority ("CTA"), the Chicago Board of Education, the Chicago Park District and the Chicago Housing Authority, has been forced to allocate scarce resources, to the tune of millions of dollars, in order to effect graffiti removal. *See* Defendant's Trial Exhibits 1, 10-15, 20, 72, 81-82, 88. Additionally, community groups have devoted significant time and energy to removing graffiti from private homes, garages, fences, roof tops, stores and other property. *See* Defendant's Trial Exhibits 25-26, 79, 84-85. Less quantifiable, but just as important as the cost of removal, are the long-term effects of graffiti on the various neighborhoods of Chicago. For instance, a tolerance for graffiti could result in physical deterioration and, thus, lower property values. R446-47 (testimony of Jay Bes-

wick); R554-55, 565-66 (testimony of Professor Wesley Skogan); Defendant's Trial Exhibit 51. Some also contend that graffiti out-of-control demoralizes a community and makes it ripe for increased criminal activity.

7. The evidence introduced regarding the magnitude of the problem certainly renders the City's effort to combat graffiti laudable. We observe, however, that the magnitude of the problem is not the primary issue before this court. Rather, as we have previously held, the court's focus remains with the costs and benefits of the measures adopted to eliminate the graffiti problem. *National Paint & Coatings Ass'n*, 803 F. Supp. at 143-44, 146-47.

D. Expected Efficacy of the Challenged Ordinances

(i) Graffiti Perpetrators and Their Motivations

8. In order to demonstrate that the means employed under the challenged ordinances will neither achieve nor move the City closer to achieving the stated local objectives of decreasing the incidents of graffiti in Chicago, plaintiffs have devoted a substantial portion of time presenting evidence regarding who creates graffiti and why. The rationale is apparent, as a comprehensive understanding as to the motivations driving the perpetrators informs the issue of whether the measures in question will serve to deter such conduct. *See* R649-50 (testimony of Dr. Charles J. Cicchetti). In this case, the answer to who creates graffiti and why leads to the conclusion that the challenged ordinances will sadly have no deterrent effect whatsoever.

9. Graffiti vandalism in Chicago is caused by three distinct groups: taggers, gang members and miscellaneous groups. The miscellaneous groups sporadically de-

face property with ethnic slurs or general messages such as "John loves Mary." R451-52 (testimony of Jay Beswick); Defendant's Trial Exhibit 88, ¶ 16 (affidavit of James Harney). Of the total graffiti in Chicago, these miscellaneous groups likely account for less than five percent, R268 (testimony of Devon Brewer); *see also* 451-52 (testimony of Jay Beswick), rendering their conduct a virtual nonissue in terms of efforts to combat graffiti. Of the remaining two groups, taggers commit the vast majority of the graffiti vandalism in Chicago, Final Pretrial Order Exhibit A ¶ 9, and virtually all of the graffiti on the CTA. Defendant's Trial Exhibits 70, 86.

10. Plaintiffs' expert witness respecting graffiti committed by taggers was Devon Brewer. In connection with his studies of taggers and the hip-hop culture with which they are affiliated, Brewer has developed personal relationships with and interviewed hundreds of taggers, or graffiti writers as they are often referred. R214, 294. According to Brewer, hip-hop graffiti began in the late 1960s in New York and Philadelphia, and gradually spread to other cities in the United States and across the world in the early to mid-1980s. R211. Brewer has studied the culture since 1987 in various cities, including Seattle, Vancouver, British Columbia, Portland, San Francisco, Los Angeles, Chicago, New York City, Amsterdam and Munich. R212-13.

11. There are three types of hip-hop graffiti: tags, throw-ups and pieces. R215. Tags are stylized signatures of a writer's chosen street name. R215; *see, e.g.*, Plaintiffs' Trial Exhibit 85A-B. Throw-ups are larger names written in bubble letters with an outline a different color than the interior of the letters. R218; *see, e.g.*, Plaintiffs' Trial Exhibit 85C-D. The most-elaborate type of hip-hop

graffiti are pieces, which are elaborate, multi-colored murals. R219-25; *see, e.g.*, Plaintiffs' Trial Exhibit 85E-P.

12. The social organization in the hip-hop graffiti culture revolves around four confederations: classes, crews, networks and the mentor-protege relationships. R246. First, classes refer to the two loosely identifiable groups of hip-hop graffiti writers. Writers begin as taggers, concentrating on the writing of tags and throw-ups. R246-47. After paying their dues and developing skill, writers will move on to pieces, and those few writers who achieve significant fame become known as elite writers. R246. Second, crews are loose configurations of friends who write graffiti together. R247. Membership in one crew does not preclude membership in another and, unlike rival street gangs, there is no animosity between crews manifesting itself in physical confrontation. R247-48. Crews range in size from 2-12 members or more. R247. Within a crew, writers share materials and skills. R248. The third social organization in hip-hop graffiti culture is the social network between writers in different crews. R250. At the top echelon, writers are networked by telephone, written letter and personal visits. R250. At the center of this network is New York City, considered by graffiti writers as "the graffiti Mecca." R250. Finally, mentor relationships are an important part of hip-hop graffiti culture. They are mutually beneficial in that the mentor often imparts knowledge in exchange for materials. R250.

13. Hip-hop graffiti writers are overwhelmingly male. R228. They tend to be teenagers, ranging in age from 12-20, although some writers begin earlier and some continue through their 20s and even 30s. R228; *see also* Defendant's Trial Exhibit 70, ¶10 (affidavit of Constance

Mortell) ("In general, the taggers I have met are males ranging in age from fourteen to twenty-two years old."). Those in their 20s and 30s, however, tend to be involved in larger and legal projects. R266-67. Writers come from all racial, ethnic and social backgrounds. R228; Final Pretrial Order, Exhibit A ¶ 8. They are highly mobile, "children of the transit system." R228, 232. Writers travel throughout the city and suburbs via automobile, public transportation and foot to obtain materials and write graffiti. R232-33, 261-62. For many, committing graffiti is the central focus of their lives and the most important aspect of their existence. R241. The commitment to graffiti writing is explained by the common values most writers share.

14. According to Brewer, hip-hop graffiti writers share two primary values, fame and artistic expression. R229. Brewer explained that achieving fame is a significant driving force for writers, as they compete with each other to obtain status among their peers. R229. Achieving fame necessitates a high degree of planning, energy and commitment; hip-hop graffiti is not random and spontaneous. R233. Three factors are important to achieving fame: (1) quality of work; (2) quantity of work; and (3) the risk involved in applying the graffiti. R230. Respecting quantity, geographic dispersion is an important aspect, prompting writers to travel not only throughout the City, but also to the suburbs. R230. To develop high quality, writers often practice in "piece books." R237-40; *see e.g.*, Plaintiffs' Trial Exhibit 86. Writers also learn from other writers as well as from books, magazines and newsletters devoted to hip-hop graffiti. R235-37; *see, e.g.*, Plaintiffs' Trial Exhibit 27. The risks associated with more valued graffiti include,

for instance, that written on the "third rail" of the subway or the top of a freeway sign. R240-41. The second primary value, artistic expression, refers to the artistic value of the graffiti, an attribute even assigned to tags. R242.

15. Writers also share two secondary values, power and rebellion. R243. There are two aspects to power, the first being the sense of individual power a writer obtains by controlling various surfaces with his name. R243. The second aspect is the collective power that writers enjoy by being part of a movement or culture. R243. The final value is rebellion, *i.e.*, the chance to disobey the conventional norms of our society. R244. Many writers thrive on the push-and-pull with authorities inherent in graffiti writing. R244-45.

16. Gang graffiti is the second major type of graffiti in Chicago and is distinct from hip-hop writing. Gangs use graffiti to mark territory and eulogize their dead. R185 (testimony of Dr. Diane Stone, a psychologist for the Chicago Board of Education); Plaintiffs' Trial Exhibit 96, at 3 (affidavit of Dr. Ray Hutchinson, an expert on Hispanic gangs in and around Chicago); *see also* Defendant's Trial Exhibit 83, ¶ 19 (affidavit of Officer Robert J. Simandl). Within gang culture, far from being a random or unplanned activity, "younger members are instructed on where and when to apply graffiti." R185-86; Plaintiffs' Trial Exhibit 96, at 9; *see also* Defendant's Trial Exhibit 83, ¶ 21 (In general, those still in elementary school commit gang graffiti.). Gang leaders oversee the placing of graffiti to ensure that unwanted attention is not brought upon the gang. Rl87. To be sure, according to Police Officer Don Lewis, graffiti is "playing lessor of a role" in gang culture in recent years as "the gang lead-

ers, through the error of their past activities, have realized that it's no longer chic to be the stand out, to be overt." Plaintiffs' Trial Exhibit 156, at 85-86.

17. Although a variety of City witnesses stated, assumed or implied that graffiti is a spontaneous and random act, only three defense witnesses have had any significant contact with taggers or gang members in Chicago. Lt. Robert Angone and Constance Mortell have come in contact with a substantial number of taggers. Each of their testimony, however, corroborates that of plaintiffs' expert, Devon Brewer. For instance, although Angone stated in his affidavit that, "[a] tagger's degree of commitment to graffiti vandalism greatly varies . . . [and that taggers] commit much of their tagging on impulse . . . [and] for recreational benefits," Defendant's Trial Exhibit 86, ¶ 15, Angone has previously acknowledged that 90-95% of the graffiti affecting the CTA is committed by a group of individuals who spend most of their waking hours planning and writing graffiti:

> Q. Can you tell me what is your opinion as to the motivation behind one who tags?
>
> A. The motivation of a tagger is to vandalize, to graffiti vandalize as many surfaces as possible. It's a mind type of thing that it's just my vast experience from talking and dealing with hundreds and hundreds of them. They are some more to a degree more than others. There's 247s and then there's regular taggers that only go out after school or on weekends, but the number one objective is to get their tag name up in as many places as they can without getting caught.
>
> Q. Is the purpose of that to gain recognition among their peers for the quantity?

A. The sole purpose of that is recognition not only among their peers, but everyone else who they think sees it. In some cases their peers don't have anything to do with it.

Q. And the more graffiti the higher their status?

A. Absolutely.

Q. You've mentioned in your previous answer the 247s.

A. 247 is exactly what he is, he's a 247, 24 hours a day 7 days a week. He's known in the trade as a 247.

Q. This is a full-time committed tagger?

A. That is a real tagger.

Q. What percentage of the CTA tagging graffiti would you attribute to the 247s?

A. I'd say that we're dealing with the CTA the transit authority problem, I'd say is being done by 90 percent of their taggers, 90 to 95 percent are done by 247s.

Q. 90 to?

A. 90 to 95 percent.

Q. I assume when someone spends 24 hours a day 7 days a week doesn't leave much for anything else. These people are focused almost entirely on this activity?

A. Entirely? As far as entirely by never washing, never eating, never sleeping, no.

Q. It's their life?

A. It's basically what they do at this particular time.

Plaintiffs' Trial Exhibit 157, at 112-14. Similarly, Constance Mortell testified that a small group of committed

taggers, approximately 70 people organized into 14 crews, account for 75-80% of the graffiti on the CTA. Plaintiffs' Trial Exhibit 99, at 29. Respecting the motivations of gangs in committing graffiti, the City presented the written testimony of Chicago Police Officer Robert J. Simandl, who has served 16 years in the Department's Gang Crime Investigation Division and 4 years in the Youth Division. *See* Defendant's Trial Exhibit 83. His testimony is entirely consistent with that of Drs. Stone and Hutchinson as to who commits gang graffiti and why. *See id.* at ¶¶ 18-22.

18. Despite their accord as to the motivations of the two major perpetrators of graffiti in Chicago, naturally, the parties' experts rendered polar opinions as to the ultimate issue of deterrence. All three of plaintiffs' experts testified that neither of the challenged ordinances would reduce the level of graffiti in Chicago. R192-93 (testimony of Dr. Stone); R261-64 (testimony of Devon Brewer); Plaintiffs' Trial Exhibit 96 (Affidavit of Dr. Hutchinson); *see also* R399-401, 412-13, 462-63 (testimony of Jay Beswick). On the other hand, the three City witnesses who have had contact with taggers or gang members in Chicago testified that the ordinances would be valuable tools in combatting graffiti, likely shortening the span of time over which an individual commits graffiti, deterring new vandals from engaging in the crime, and reducing the number and extent of incidents of graffiti vandalism. Defendant's Trial Exhibits 70 (Mortell), 83 (Simandl), and 86 (Angone). This court finds that the extraordinary commitment on the part of those who commit graffiti points to the conclusion that the ordinances in themselves will not deter the incidents of graffiti in Chicago. Commitment alone, of course, is insufficient to

overcome all obstacles of regulation. Nonetheless, when such commitment is viewed in conjunction with other factors, including (1) the availability of alternate sources of spray paint and large markers, (2) the availability of substitute materials to effect graffiti, and (3) the ordinances' failure to increase the risk of apprehension, it becomes evident that the ordinances in question have little possibility of furthering the City's objective.

(ii) Availability of Alternate Sources

19. Both Drs. Charles Cicchetti and Louis Wilde, designated by the City to testify as to the likely impact of the challenged ordinances on the level of graffiti in Chicago, approached the task from the perspective of a cost-benefit, economic theory. In short, Cicchetti and Wilde posited that if the ordinances increase (1) the time required to seek out alternate sources of spray paint and large markers, and (2) the material and transportation costs associated with obtaining such alternate sources, then the overall graffiti level in Chicago will decrease as (i) fewer participants will enter into the tagging population, and (ii) those involved will decrease the frequency and intensity of their graffiti vandalism. R614-18 (Cicchetti); R885-86 (Wilde). We accept this theory as sound. Cicchetti and Wilde's respective opinions, however, that the ordinances in fact will result in an over decrease in graffiti rests on an empirical assumption that the regulation will in fact increase the time, material and transportation costs associated with obtaining spray paint and large markers from alternate sources. The evidence presented by plaintiffs is contrary to this assumption.

20. The parties have stipulated that "[a] majority of persons who commit graffiti vandalism in Chicago are Chicago residents, and a minority of these persons are not Chicago residents." Final Pretrial Order, Exhibit A ¶ 10. For those non-residents committing graffiti vandalism in Chicago, it is axiomatic that the challenged ordinances have no impact on their cost of obtaining spray paint and large markers. For those who reside in Chicago, there is easy access, via both public and private transportation, to the suburbs where there are literally hundreds of outlets selling spray paint and large markers. *See* Plaintiffs' Trial Exhibit 2. Respecting the most often graffiti vandalized property, CTA buses and subway cars, these mobile targets travel to and from the suburbs on a routine basis. *See* Plaintiffs' Trial Exhibit 1. For many of the permanent property targeted by graffiti vandals, transportation time to the suburbs to acquire spray paint or large markers is less than ten minutes. *See id.*; R685-86 (testimony of Carmen Lomellin). As previously noted, both taggers and gang members in fact sojourn to the suburbs on a frequent basis. Consequently, given the availability of spray paint and large markers in the suburbs, the familiarity with and easy access to the suburbs of both gang members and taggers, and their strong motivation to obtain such items to commit graffiti, it is plain that the increased cost, if any, of obtaining spray paint and large markers will not decrease the incidents of graffiti in Chicago.

21. Additionally, to the extent that some graffiti vandalism may be discouraged from procuring spray paint and large markers in the suburbs, that does not mean that these individuals will have no access to these materials. First, as Lt. Angone readily admits, a large un-

derground market for spray paint and large markers already exists in Chicago. Angone described the arrest of a supplier who was selling thousands of spray paint cans from three garages, responsible for up to 80% of the supply used by CTA vandals, at prices significantly cheaper than retail. R712-13; *see also* Plaintiffs' Trial Exhibit 136. Second, as Constance Mortell admitted, even if only a small number of writers or their suppliers went to the suburbs, they would likely bring back enough spray paint and large markers to supply other children who are part of the problem. Plaintiffs' Trial Exhibit 99, at 76. Third, there are a plethora of mail order and non-retail-licensed outlets for spray paint and large markers in the City of Chicago, all able and willing to meet the demand of local graffiti vandals.

(iii) Availability of Substitute Materials

22. Further undermining Cicchetti and Wilde's conclusion regarding the impact of the challenged ordinances on the incidents of graffiti in Chicago, is the current availability and use of homemade devices and other materials in aerosol cans to create graffiti. In addition to spray paint and large markers, Lt. Angone stated that graffiti is created with rollers, brushes, rags, wicks, non-aerosol cans, bottles, water balloons, homemade devices in which any kind of liquid paint or ink can be poured in, fingernail polish, lipstick, eyebrow pencils, melted wax, glue, and shoe polish. R710-12; Plaintiffs' Trial Exhibit 157, at 94-96, 223-25; *see, e.g.*, Plaintiffs' Trial Exhibit 47 (homemade devices). Lt. Romero provided a similar list. R818-21. Further, there are many aerosol products on the market which look and are applied like spray paint, including automotive undercoats, disc brake silencer, in-

dustrial layout fluid, gasket adhesive, battery protector, automotive belt dressing, tree wound dressing and industrial lubricants. R55-64 (testimony of Joseph Scaminace); *see, e.g.*, Plaintiffs' Trial Exhibit 66. These products, not effected by the ban, can, and likely will, be used to create graffiti with no more time or material cost than that associated with spray paint and large markers. Further, many of these devices and products are no larger than spray paint and, thus, as easy to conceal. Many are no more clumsy to apply.

23. Another likely effect of banning spray paint and large markers will be an increase in other, and more destructive, forms of graffiti, such as etching and stickers. As a CTA maintenance worker commented in a videotape prepared by the CTA: "[Graffiti writers] use etchers, knives, scraper blades, and if they can't paint it, then they'll scrape and etch to mark it, so, the cost is going to eventually come back to you." Plaintiffs' Trial Exhibit 49. Jay Beswick testified regarding the numerous small and easily concealable items that can be used to scratch a tag into a glass window or other surface. R422-23; *see, e.g.*, Plaintiffs' Trial Exhibit 48 (etching tools). Like etching, stickers are a popular form of graffiti in that they can be covertly applied in very little time. R227-28 (testimony of Devon Brewer). In sum, given the motivation of graffiti vandals, even a complete elimination of spray paint and large markers will not eliminate graffiti; rather, it will cause juveniles to turn to other applicators to effect graffiti.

(iv) Risk of Apprehension

24. Finally, in arriving at his conclusion respecting the likely deterrent effect of the challenged ordinances,

Dr. Wilde considered a factor he labelled "risk of apprehension." According to Wilde, to the extent that the ordinances increased writers' fear of being caught applying or preparing to apply graffiti, the incidents of graffiti will decrease in Chicago. R887-88. Wilde speculates that the ordinances in question will increase writers' risk of apprehension in that (1) if it takes longer to commit an act of graffiti without spray paint or large markers, exposure time is increased, and (2) the possession ordinance makes it easier to arrest individuals because intent is irrelevant. *Id.*

25. Contrary to Wilde's first assumption, the evidence presented in this case, as discussed in the preceding section, indicates that graffiti can be applied with alternate materials as quickly as it can be applied with spray paint or large markers. Thus, exposure time cannot be considered a factor increasing the risk of apprehension.

26. In general, whether persons engaged in criminal conduct will possess an increased fear of apprehension in the face of a change in law presents a complex question. Indeed, the speculation involved is ordinarily enough to presume the new law will in fact increase apprehension and, thus, decrease criminal conduct. In the instant case, however, the impact on graffiti writers' apprehension level associated with the challenged possession ordinance is a non-issue. The City already prohibits minors from possessing spray paint and large markers regardless of their intended use. Municipal Code of Chicago, § 8-16-095. In that minors commit almost all of the graffiti in Chicago, all in violation of § 8-16-095, adding a new law, which as to these individuals duplicates the efforts of an existing law, will not add to the risk of

apprehension. *See* R899-900 (testimony of Dr. Wilde) (if it is currently illegal for minors to possess spray paint and large markers irrespective of intent, then the risk of apprehension would not change with the addition of § 8-4-130(a)).[3]

E. Expected Burdens Imposed by the Challenged Ordinances

27. That the challenged ordinances will not fulfill or even significantly advance the City's laudable goal of eradicating graffiti vandalism is only half of the story. In this section we consider the likely hardships created by the challenged ordinances.

28. The City does not contest that spray paint has many legitimate and beneficial uses, including painting furniture, railings, radiators, barbecue grills, lawn and

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[3] We observe that Public Act 88-0406, enacted since the close of evidence in this case, provides City law enforcement with a powerful new weapon in its battle against graffiti. That act amends both the Juvenile Court Act of 1987, 705 ILCS 405/5-19, amends and adds a new section to the Criminal Code of 1961, 720 ILCS 5/21-2, and amends the Parental Responsibility Law, 740 ILCS 115/3. In essence, the new act allows police to charge graffiti vandals with criminal defacement of property. A second conviction under the act is considered a Class 4 felony, and is punishable with at least a year in jail and a maximum of 120 hours of community service. Previously, acts of graffiti were considered misdemeanors. According to Lt. Angone, "This isn't what [graffiti writers] are used to. When word gets out about this, I'm sure it's going to help us quite a bit. It's going to be a big surprise to them." *Police Hope New Law, Arrests Send Stern Message to Graffiti Artists*, Chi. Trib., Sept. 20, 1993, § 2, at 3. This new law further diminishes the possibility that enforcing the challenged ordinances will result in an increased risk of apprehension.

garden equipment, fences, toys, cars, appliances, and cabinets; work involving stencils; hobby and crafts projects; art and theater uses; safety and hazard markings; and many other activities by homeowners preserving and improving their property. R139-40 (testimony of Thomas Flavin); R300-02 (testimony of Neil Barry). Likewise, there are many legitimate and beneficial uses of large markers. To be sure, we observe that the markers used by the City to create their demonstrative exhibits during trial contained a non-water soluble fluid and had a writing surface of greater than 3/8 of an inch. For many uses of spray paint and large markers, there are no adequate substitutes. R172-73 (testimony of Thomas Flavin); R302-18 (testimony of Neil Barry); *see, e.g.*, Plaintiffs' Trial Exhibits 5-8. Thus, in the face of the challenged ordinances, Chicago consumers of spray paint and large markers will be faced with undesirable choices, including: (1) spending limited free time traveling to the suburbs to acquire spray paint or large markers; (2) purchasing a substitute good, if available; or (3) abandoning the project altogether.

29. To establish the likely sales losses to Chicago retailers and manufacturers of spray paint, plaintiffs presented the testimony of John W. Skorburg, currently the Chief Economist of the Chicagoland Chamber of Commerce. According to Skorburg, over the next six years alone, Chicago retailers (and thus manufacturers who make spray paint primarily in plants outside of Illinois) would lose over 55 million dollars in direct sales. Plaintiffs' Trial Exhibits 9, 88. Additionally, in that approximately 40% of current Chicago consumers of spray paint would go to the suburbs to purchase the product, Skorburg estimates that, over the next six years alone,

Chicago retailers would lose over 50 million dollars in peripheral sales. Plaintiffs' Trial Exhibits 9, 88. Large markers would comprise some percentage of the lost peripheral sales. *See* R141 (testimony of Thomas Flavin) (large markers are "an accommodation sale").

30. In that most Chicago retailers operate on small profit margins, the loss of these sales stemming from a ban on the retail sale of spray paint and large markers may drive a substantial number of retailers out of business. *See* R171-72 (testimony of Thomas Flavin); 8477 (testimony of Thomas Daly). Retailers who would remain in business would likely suffer a significant loss of customers. R477; Plaintiffs Trial Exhibits 89, 90. Manufacturers would be forced to cut capital investment and employment. R45-51 (testimony of Joseph Scaminace).

31. In an effort to discredit Skorburg's calculations, the City relied on the testimony of Michael Kennelly, a consultant with the Arthur Anderson Company. Kennelly's calculations, under which he still estimated tens of millions of dollars in lost retail sales over the next six years, differed from Skorburg's in two major respects. First, Kennelly used a different starting figure regarding the number of cans of spray paint filled in 1993. Second, Kennelly did not include lost peripheral sales in his calculations. Kennelly's analysis in both regards is flawed. Respecting the number of spray paint cans filled in 1993, Kennelly's calculation assumed that over 80% of a can's content was paint concentrate as opposed to propellant. In fact, only 60% of a can's content is paint concentrate. R299 (testimony of Neil Barry). When Kennelly recalculated the number using the 60% figure, he came up with 350 million fills in 1993, extremely close to the 360 million figure used by Skorburg. R856 (testimony of

Michael Kennelly). Kennelly's refusal to acknowledge lost peripheral sales is not only contrary to his own prior calculations, *see* Plaintiffs' Trial Exhibit 117, R861-63, but also to the testimony of Charles Cicchetti, upon whom Kennelly purportedly relied. *See* R634 (testimony of Charles Cicchetti) (admitting that consumers who will travel to the suburbs for spray paint are likely to purchase other products as well).

32. We observe that, although plaintiffs have demonstrated a substantial burden on interstate commerce flowing from the ban on the retail sale of spray paint and large markers, plaintiffs have presented no testimony concerning the burdens stemming from the possession ordinance. Rather, plaintiffs assert that, if enforced as written, § 8-4-130(a) will cause the same harms as those discussed regarding the retail sales ban in § 4-132-150. R538-39. Without some testimony on the matter, however, this court will not equate the harms flowing from each ordinance. True, as written, the possession ordinance imposes burdens on purchasers of spray paint and large markers. And, those burdens may indeed result in a negative impact on interstate commerce. However, in that those burdens are distinct from those imposed under the provision completely banning the retail sale of such products, we require competent testimony to conclusively establish the precise impact on interstate commerce and, in the absence of such testimony, we will not speculate as to the extent of those burdens.

F. Reasonable Alternatives to the Challenged Ordinances

33. Throughout this lawsuit, the City has contended that the challenged ordinances were not the first step

taken to combat graffiti. Rather, according to the City, the challenged ordinances represent a more aggressive approach than the multi-pronged programs it had implemented in the past. The City would have this court believe that the advanced ban is the only option left to effectively combat graffiti. *See* Defendant City of Chicago's Trial Brief at 16 (June 22, 1993) ("Finally, there are no less restrictive alternatives for addressing graffiti vandalism. The City has actively pursued less restrictive means of combatting graffiti vandalism, and still the proliferation of graffiti increases."). This assertion is belied by the testimony, and is contradicted by the implementation dates of the programs the City touted at trial.

34. Although the City has made concerted efforts to combat graffiti, it has not tried all reasonable measures short of a ban of spray paint and large markers prior to passing the challenged ordinances. The City introduced a substantial amount of testimony concerning its three-pronged effort to combat graffiti, including education, eradication and enforcement. R652-73 (testimony of Carmen Lomellin). This effort comprises an aggregation of nine separate programs. As Lomellin admitted, the vast majority of these programs were established after the filing of this lawsuit. R677-80. For those programs in existence prior to May of 1992, the City's funding had declined in years prior to the passage of the challenged ordinances. For instance, the Police Department's education program, which the City heralded as a key element of its anti-graffiti effort, steadily declined in funding from $9,600 in 1983 to $4,000 in 1990. Plaintiffs' Trial Exhibit 105; Defendants Trial Exhibit 35. This is not to say that the City's recent anti-graffiti efforts are not laudable. To the contrary, as the City represents, they constitute a

substantial step toward the eradication of Chicago's graffiti problem. They also demonstrate that, at the time the City passed the challenged ordinances on May 20, 1992, many measures of eliminating graffiti short of a ban on spray paint and large markers stood unexplored.

35. Further, to the extent that the City denies that any measures short of a ban on spray paint and large markers will be unsuccessful in reducing the graffiti problem in Chicago, we disagree. Certainly, the combination of vigorous law enforcement and prompt removal of graffiti has been successful with respect to the subway systems in both New York, R786, 804-05 (testimony of Lt. John Romero), and Chicago. R723-24 (testimony of Lt. Robert Angone; Plaintiffs' Trial Exhibit 35, 36, 144. The subsequent problems of the CTA may very well be attributable to a faltering in effort and commitment. For instance, when Lt. Angone was transferred from the Public Transportation Section's anti-graffiti squad, arrests dropped abruptly; when he returned, arrests again rose. R721-22. Other programs, including educational efforts and the introduction of legal graffiti zones or permission walls, offer promising means to combat the problem. *See* Plaintiffs' Trial Exhibits 28, 37, 149. In short, while no easy solution exists, other alternatives were left unexplored or abandoned prior to the adoption of the challenged ordinances on May 20, 1992.

II. CONCLUSIONS OF LAW

A. Standing

1. In light of the evidence presented at trial and the change in plaintiffs since the filing of the complaint, we are compelled to revisit our previous ruling respecting

plaintiffs' standing to challenge § 8-4-130(a), the possession ordinance. As was the case in confronting the question in connection with the City's motion to dismiss, the only contested issue is whether plaintiffs have shown that they have suffered an actual or threatened injury stemming from the enactment of § 8-4-130(a). In previously holding that plaintiffs have met this burden, we reasoned: "The fear of prosecution under § 8-4-130(a) of those plaintiffs who anticipate possessing, without consent, spray paint and large markers in Chicago's public buildings, public facilities or on the property of another is a sufficient threatened injury to meet the "injury in fact" requirement of *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982)." *National Paint & Coatings Ass'n*, 803 F. Supp. at 141 (citing *Kucharek v. Hanaway*, 902 F.2d 513, 516 (7th Cir. 1990)). Since our prior ruling, however, those plaintiffs who would possess such a fear have all dropped out of the lawsuit. In that none of the remaining plaintiffs possess a reasonable fear of prosecution, they must demonstrate some other injury to confer standing.

2. To salvage their standing, the remaining plaintiffs point to the likelihood of lost sales resulting from consumers' anticipated reaction to the possession ordinance. Indeed, indirect losses in sales attributable to a challenged regulation is generally sufficient to confer standing. *See Government Suppliers Consolidating Serv. v. Bayh*, 975 F.2d 1267, 1274 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 977, 122 L. Ed. 2d 131 (1993). In the instant case, we speculated that "it is reasonable to conclude that [the] fear of prosecution will result in financial bases to those plaintiffs who sell such items, as consum-

ers change their consumption patterns to avoid prosecution under the possession ordinance." *National Paint & Coatings Ass'n*, 803 F. Supp. at 141. However, while such speculation may have been sufficient to avoid dismissal prior to trial, it did not alleviate plaintiffs' obligation to present some evidence at trial to support the contention that they will suffer economic injury resulting from the possession ordinance. As discussed above, plaintiffs have failed to present such testimony and, as such, we can only conclude that they lack standing to challenge the possession ordinance.

B. Commerce Clause

3. In Count I of their complaint, plaintiffs contend that § 4-132-150 violates the commerce clause of the United States Constitution. We have previously held that this ordinance on its face applies even-handedly between intra- and inter-state commerce, attempts to advance a legitimate local interest, and only incidently impacts interstate commerce. *National Paint & Coatings Ass'n*, 803 F. Supp. at 142-43. Thus, under *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970), we will uphold the legislation "unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." This question parts from the legislative purposes as espoused, instead focusing on the extent of the burdens imposed by, and the benefits derived from, the ordinance. It is an empirical question—"one of degree." *Pike*, 397 U.S. at 142, 90 S. Ct. at 847.

4. As the City has aptly noted, ours is a necessarily confined judicial role. Certainly, the United States Con-

stitution does not compel the City of Chicago to subscribe to any particular means of combatting the problem of graffiti. As such, this court will not " 'second-guess the empirical judgments of lawmakers concerning the utility of legislation . . . .' " *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 92, 107 S. Ct. 1637, 1651, 95 L. Ed. 2d 67 (1987) (quoting *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 679, 101 S. Ct. 1309, 1320, 67 L. Ed. 2d 580 (1981) (Brennan, J., concurring)). As the Seventh Circuit has recently reaffirmed, however, this is not to suggest that legislation neutral on its face and espousing a laudable goal is immune from scrutiny under the Commerce Clause. *Government Suppliers Consolidating Serv.*, 975 F.2d at 1285-86 (invalidating state legislation touching upon health and safety under the *Pike* balancing test). " 'Regulations designed for that salutary purpose nevertheless may further the purposes so marginally, and interfere with commerce so substantially, as to be invalid under the Commerce Clause.' " *Id.* at 1286 (quoting *Kassel*, 450 U.S. at 670, 101 S. Ct. at 1316).

5. In the instant case, plaintiffs have clearly demonstrated that the retail ban on the sale of spray paint and large markers will have virtually no deterrent effect whatsoever on those who commit graffiti, taggers and gang members. The only persons likely to forgo the use of spray paint and large markers are the substantial number of adults who will abandon their legitimate projects because no adequate substitute exists and they are not as motivated as the vandals to go to the suburbs to acquire such products otherwise banned in Chicago. As a result, retailers and manufacturers of these goods will suffer losses of potential sales in the tens of millions of dollars. Additionally, Chicago retailers will lose law-

abiding customers and, thus, the sales of other products peripheral to spray paint and large markers. Under these circumstances, § 4-132-150 is invalid under the commerce clause of the United States Constitution.

C. Substantive Due Process

6. State ordinances can be said to deny substantive due process only if they do not bear a rational relationship to a legitimate governmental interest. *Williamson v. Lee Optical Co. of Oklahoma, Inc.*, 348 U.S. 483, 487-88, 75 S. Ct. 461, 464, 99 L. Ed. 563 (1955); *Nebbia v. New York*, 291 U.S. 502, 524-25, 54 S. Ct. 505, 510, 78 L. Ed. 940 (1934); *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 467 (7th Cir. 1988); *Vaden v. Village of Maywood*, 809 F.2d 361, 364 (7th Cir.), *cert. denied*, 482 U.S. 908, 107 S. Ct. 2489, 96 L. Ed. 2d 381 (1987); *Waste Management of Illinois, Inc. v. Metropolitan Water Reclamation Dist. of Greater Chicago*, 1989 WL 56917, at *2-3 (N.D. Ill. May 23, 1989). Within this context, the Seventh Circuit has held that legislation does not bear a rational relationship to a legitimate governmental interest only if it is "arbitrary and unreasonable," *i.e.*, "invidious or irrational." *Coniston Corp.*, 844 F.2d at 467; *Burrell v. City of Kankakee*, 815 F.2d 1127, 1129 (7th Cir. 1987).

7. The ordinance in question, § 4-132-150, is a rarity in that it purports to ban the retail sale of spray paint and large markers simply because a small percentage (estimated at approximately 1%, *see* R422, 461) of the products are misused by graffiti vandals. The constitutionality of such a blunt approach has been questioned by at least one court. As the court stated in *Bambu Sales, Inc. v. Gibson*, 474 F. Supp. 1297, 1305 (D.N.J.

1979), it would be unconstitutional "to make it an offense to provide coin or currency to another merely because coin and currency are 'ordinarily used' for gambling," or to prohibit the sale of "such articles as potatoes, barley, corn, sugar, molasses or yeast merely because these articles, as well as any other starch or sugar, can be fermented to manufacture alcoholic beverages. The same applies to vessels and piping, which can be used for distillation." This unfavored approach, when coupled with overwhelming evidence that the legislation will not advance the City's goal of eradicating graffiti, leads the court to conclude that § 4-132-150 is "irrational" and, hence, violates plaintiffs' right to substantive due process as guaranteed under the United States Constitution.

D. The City's Police Power

8. Article VII, § 6(a) of the Illinois Constitution authorizes local governments, such as the City of Chicago, to function as home rule units to "exercise any power and perform any function pertaining to its government and affairs." Pursuant its police power, the City may "restrict or prohibit the exercise of a legitimate trade where it is necessary for the protection of the public health, morals, safety or welfare." *Opyt's Amoco, Inc. v. The Village of South Holland*, 149 Ill. 2d 265, 269, 595 N.E.2d 1060, 1062 (1992) (quoting *Figura v. Cummins*, 4 Ill. 2d 44, 122 N.E.2d 162 (1954)). To constitute a legitimate exercise of the police power, municipal regulation "must bear a reasonable relationship to the public interest sought to be protected and the means adopted must be a reasonable method of accomplishing the chosen objective." *Id.* (citing *Crocker v. Finley*, 99 111. 2d 444, 459 N.E.2d 1346 (1984)); *see also Finish Line Express, Inc. v. City of*

Chicago, 72 Ill. 2d 131, 138, 379 N.E.2d 290, 292 (1978); *Midwest Petroleum Marketers v. City of Chicago*, 82 Ill. App. 3d 494, 500, 402 N.E. 2d 709, 714 (1st Dist. 1980). Once the legislative body determines that a problem exists and acts to protect and promote the general welfare of its citizens, the legislation is presumed to be a valid exercise of the City's police power. *Opyt's Amoco*, 149 Ill. 2d at 269, 595 N.E.2d at 1062; *Midwest Petroleum Marketers*, 82 Ill. App. 3d at 500, 402 N.E.2d at 714 (citing *Union Cemetery Ass'n v. Cooper*, 414 Ill. 23, 110 N.E.2d 239 (1953)). The mere fact that the legislature has invoked the police power, however, is not conclusive that the power was lawfully exercised; it remains within the province of the court to determine that issue. *Opyt's Amoco*, 149 Ill. 2d at 269, 595 N.E.2d at 1062 (citing *Figura*, 4 Ill. 2d at 49, 122 N.E.2d at 165).

9. As we have previously observed, the standards set forth above involve the same inquiry as those employed in our substantive due process analysis. *National Paint & Coatings Ass'n*, 803 F. Supp. at 147. Consequently, for the reasons stated *supra* subsection II(C) of this opinion, we conclude that § 4-132-150 constitutes an illegitimate exercise of the police power afforded the City of Chicago under the Illinois Constitution.

III. CONCLUSION

For the reasons set forth above, we hold: (1) plaintiffs lack standing to challenge § 8-4-130(a), the possession ordinance; and (2) § 4-132-150, banning the retail sale of spray paint and large markers (i) imposes an impermissible burden on interstate commerce, (ii) violates plaintiffs' right to substantive due process as guaranteed under the

United States Constitution, and (iii) constitutes an illegitimate exercise of the police power afforded the City of Chicago under the Illinois Constitution. Consequently, plaintiffs' prayer for declaratory and injunctive relief is granted as it relates to § 4-132-150 of the Municipal Code of Chicago and denied as to § 8-4-130(a) of the Municipal Code of Chicago. It is so ordered.

/s/ Marvin Aspen
MARVIN E. ASPEN
United States District Judge

Dated 9/29/1993

Supreme Court, U.S.
FILED
MAY 24 1995

No. 94-1739

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

NATIONAL PAINT & COATINGS ASSOCIATION, *et al.*,
Petitioners,
v.
CITY OF CHICAGO,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Commerce Clause requires heightened judicial scrutiny of legislation that prohibits the sale of items likely to be used for graffiti vandalism but does not create any discriminatory or disproportionate burden on interstate commerce.

2. Whether the Commerce Clause requires a district court to conduct a trial to determine whether a non-discriminatory prohibition on the sale of items likely to be used for graffiti vandalism is likely to achieve the putative benefit identified by the legislature in enacting the measure.

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (Pet. App. 1-18) is reported at 45 F.3d 1124 (7th Cir. 1995). The opinion of the United States District Court for the Northern District of Illinois in which that court rendered its final judgment (Pet. App. 20-51) is reported at 835 F. Supp. 421 (N.D. Ill. 1993). The opinion of the district court granting in part and denying in part the motion to dismiss petitioners' complaint is reported at 803 F. Supp. 135 (N.D. Ill. 1992).

STATEMENT

The City of Chicago has long faced the problem of graffiti vandalism—the intentional defacing of property, without the consent of the owner, by marking that property with a design or drawing so that it may be seen by

the public. See Pet. App. 25-26. The magnitude of that problem is staggering: graffiti vandalism pervades the City of Chicago on every conceivable type of private and public property. *Ibid.* Five million square feet of property in Chicago are defaced by graffiti. *Ibid.*

In combatting this problem, the City, other public agencies, and private parties as well, have been forced to devote scarce resources to remove the work of graffiti vandals. This graffiti-abatement effort costs millions of dollars, as well as significant amounts of time and energy, annually. Pet. App. 25. But graffiti vandalism imposes other costs on our communities as well: it can undermine the psychological well-being and the stability of communities and neighborhoods. *Id.* at 25-26.

By May 1992, it was clear that existing restrictions on the sale of spray paint in the City of Chicago were not working. For many years, the City had prohibited the sale of spray paint to persons under 18 years old. See Municipal Code of Chicago, Ill. § 135-14.1 (1984). Nevertheless, graffiti vandals still tend to be teenagers. See Pet. App. 38-39 (minors produce almost all of the graffiti in Chicago). The City also had attempted a three-pronged effort to combat graffiti: education, eradication, and enforcement. See *id.* at 43-44. This, too, did not work. And Chicago was not the only city plagued by graffiti and coming to the conclusion that additional enforcement tools were needed. In the fall of 1993, San Francisco, for example, enacted a so-called lock-up law, which prohibits the display of spray paint and marker pens in an area of a store that is accessible to the public without employee assistance. See generally *Sherwin Williams Co. v. City and County of San Francisco*, 857 F. Supp. 1355 (N.D. Cal. 1994) (upholding lock-up law against Commerce Clause challenge on essentially the same evidence as in this case).

The City of Chicago decided on another approach to attempt to ameliorate the problem of graffiti. That in-

novation, the first of its kind in the country, was an ordinance, enacted in May 1992 by the Chicago City Council, that prohibited the sale at retail of spray paint and large-tip markers. See Municipal Code of Chicago, Ill. § 4-132-150 (1992).[1]

Less than a month later, petitioners filed suit challenging the ordinance on a variety of grounds. Petitioners raised claims involving the Commerce Clause; the Equal Protection Clause; the Due Process Clause, both substantive and procedural; First Amendment overbreadth; and several state law grounds. After the City's motion to dismiss was granted in part, three claims remained: that the challenged ordinance (1) imposed an impermissible burden on interstate commerce in violation of the dormant Commerce Clause;[2] (2) violated the guarantee of substantive due process under the United States Constitution; and (3) constituted an illegitimate exercise of the police power afforded the City under the Illinois Constitution. The district court concluded that it required an evidentiary hearing to resolve petitioners' remaining constitutional claims. See *National Paint & Coatings Association v. City of Chicago*, 803 F. Supp. 135, 143-44, 146-47 (N.D. Ill. 1992). On petitioners' dormant Com-

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[1] The ordinance provides:

> It shall be unlawful for any person holding a retail business license to sell paint in spray cans to any person or to sell any marker containing a fluid which is not water soluble and has a point, brush, applicator or other writing surface of three-eighths of an inch or greater to any person.

Municipal Code of Chicago, Ill. § 4-132-150 (1992). We refer hereafter to spray paint and large-tip markers collectively as "spray paint."

[2] Although the text of the Commerce Clause contains only a grant of authority to Congress to regulate interstate commerce (see U.S. Const. art. I, § 8, cl. 3), the Court has understood the negative or dormant aspect of the Clause to invalidate state or local regulation that impermissibly burdens interstate commerce even in the absence of congressional action. *E.g., Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 128 (1988).

merce Clause challenge, the district court concluded that the spray-paint ordinance regulated inter- and intrastate commerce evenhandedly, was directed at a legitimate governmental interest, and imposed only an incidental burden on interstate commerce. See 803 F. Supp. at 142-43. Nevertheless, the district court held that that claim should survive a motion to dismiss because only a trial would disclose whether the spray-paint ordinance was likely to achieve its goal of reducing graffiti vandalism in Chicago. See *ibid.* The court believed that *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), authorized it to make findings of fact on the efficiency of the ordinance. The district court relied on this passage from *Pike* for that notion:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

Id. at 142. Accordingly, the district court conducted a six-day bench trial. Nine experts for both sides testified about the likely effect of the ordinance.

After the trial, the district court concluded, on the Commerce Clause issue, that the ordinance would not be effective in achieving its goal of deterring graffiti in Chicago, but would prevent law-abiding residents of Chicago from purchasing spray paint. See Pet. App. 46-48. According to the district court, the ordinance therefore failed the *Pike* test—and violated the dormant Commerce Clause—because there are no "putative local benefits" to weigh in the balance against the admitted effect that the ordinance will have on interstate commerce. *Ibid.* The court also concluded that the ordinance was arbitrary, in violation of substantive due proces doctrine, also essentially because, in the court's view, the ordinance would not be effective. See *id.* at 48-49. Finally, the court believed that the ordinance exceeded the limits of the City's police power under Illinois law. See *id.* at 49-50.

The Seventh Circuit reversed the district court on all grounds. The court quickly disposed of the district court's reasoning on the City's police power under Illinois law and substantive due process, and then turned to the Commerce Clause, which is the only issue petitioners continue to press. In discussing the dormant Commerce Clause, the Seventh Circuit explained that there are three categories of local laws affecting commerce: laws that "explicitly discriminate against interstate commerce" (Pet. App. 11), such as laws that prohibit the importation into a state of articles of commerce from outside that state; laws that are neutral on their face as between states, "but that bear more heavily on interstate commerce than on local commerce" (*ibid.*), such as laws setting a maximum permissible length on truck trailers that is shorter than that of surrounding states; and laws that "affect commerce without any reallocation among jurisdictions—that do not give local firms any competitive advantage over those located elsewhere" (*id.* at 12). The Seventh Circuit concluded that the City's spray-paint ordinance fits into this third category: although the ordinance certainly affects interstate commerce, it does so without any disparate impact on interstate commerce. See *id.* at 13-14. Because the court had already found a rational basis for the legislature's conclusion that the ordinance would be an effective means to combat graffiti vandalism when rejecting petitioner's due process challenge (see Pet. App. 6-7), it upheld the ordinance under the dormant Commerce Clause as well (see *id.* at 14).

On March 3, 1995, Justice Stevens denied petitioners' application for a stay of the judgment of the court of appeals pending the filing and disposition of a petition for certiorari. The ordinance, implementation of which had been enjoined for nearly three years, then went into effect after a short grace period.

ARGUMENT

Ignoring this Court's admonition that "it is up to legislatures, not courts, to decide the wisdom and utility of legislation," *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 469 (1981) (quoting *Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963)), petitioners ask the Court to review the Seventh Circuit's determination that a court lacks authority to invalidate nondiscriminatory local legislation under the Commerce Clause solely because it doubts the efficacy of that legislation. In petitioners' view, the district court properly made its own findings of fact as to the costs and benefits flowing from Chicago's spray-paint ordinance, and then properly invalidated it, because "the ordinance would not lessen graffiti in Chicago; and . . . less restrictive alternatives existed for combatting graffiti." Pet. 4. Nothing in *Pike* or its progeny, however, authorizes such scrutiny of a nondiscriminatory enactment. To the contrary, *Pike* commands deference to a legislative judgment on the wisdom and utility of nondiscriminatory state and local laws.

In this case, the district court departed from the proper scope of dormant Commerce Clause jurisprudence. The dormant Commerce Clause prohibits only discriminatory or irrational burdens on interstate commerce. Here, the district court did not invalidate Chicago's spray-paint ordinance because it thought that the ordinance discriminated against interstate commerce, or even because it believed that the goal of reducing graffiti vandalism was insufficiently weighty to justify the incidental restriction on commerce created by the ordinance. Rather, the district court decided that the ordinance would fail to achieve its objective. As the court of appeals held, this determination lies beyond the authority of the federal courts. *Pike* does not authorize courts to conduct their own inquiry into the wisdom and utility of legislation. It requires courts to weigh the "putative local benefits" (397 U.S. at 142)—those that the legislature believes will flow from a chal-

lenged enactment, not whatever actual benefits a court predicts will be or finds are realized—against the burden on commerce imposed by the regulation.

Thus, the district court erred when it second-guessed the Chicago City Council's conclusion that a ban on the retail sale of spray paint would reduce the incidence of graffiti vandalism in Chicago. The court of appeals appropriately reversed that judgment. That court properly concluded that the ordinance should be upheld against Commerce Clause attack because the City Council could have rationally believed that the ordinance would achieve this putative local benefit. This judgment is correct; it conflicts with no ruling from any other circuit; and it deprived petitioners of no right to a hearing that they would have enjoyed in another circuit.

1. Petitioners contend that the decision below conflicts with decisions of this Court and other circuits, a claim that rests solely on petitioners' view that the Seventh Circuit repudiated the *Pike* test for nondiscriminatory regulations that burden interstate commerce only incidentally. Of course the court of appeals did no such thing. That court explicitly stated: "Our court has not questioned the 'validity' of *Pike* (for an inferior court must apply the Supreme Court's decisions without regard to doubts about their wisdom); we were, and are, obliged to determine the proper scope of its application." Pet. App. 10. The court of appeals interpreted *Pike* to require no "special justification" of laws that are facially nondiscriminatory, that do not discriminate against interstate commerce in either purpose or effect, and that only incidentally burden commerce in an effort to achieve some local benefit. Pet. App. 13. For such laws, "the normal rational-basis standard is the governing rule." *Id.* at 12.

That conclusion is both correct and noncontroversial. No decision of this Court or any circuit requires more than a rational basis for a legislature's conclusion about

whether the burdens of a regulation that gives rise to no discrimination against interstate commerce outweigh its benefits. Certainly petitioners cite no case that interprets *Pike* to require any heightened scrutiny of such legislation. Although petitioners have chosen to read the opinion below as holding *Pike* inapplicable to this category of cases, we think it equally fair to read it as holding *Pike* was applicable, but also that *Pike* requires no more than a rational basis to support the legislature's judgment that the burden on commerce created by the ordinance is justified by its benefits. Beyond that, we think it clear that the difference, if any, between our reading of the opinion below—that *Pike* is applicable but requires only minimal scrutiny—and petitioners' reading—that *Pike* was displaced and a rational-basis test used in its stead—is one of semantics only. Plainly this doctrinal nicety has no practical significance—petitioners themselves can identify no circuit that would apply more than rational basis scrutiny to a legislature's finding that a nondiscriminatory enactment will yield local benefits, much less one in which this case would have come out differently. The academic question whether *Pike* is applicable but requires only rational basis scrutiny, or is inapplicable though the rational basis test does apply, thus does not merit review by this Court.

This conclusion that the dormant Commerce Clause requires a special justification for facially nondiscriminatory legislation only when it has a discriminatory or disproportionate effect on interstate commerce has its origin in *Pike* itself. *Pike* involved an Arizona statute requiring that fruit grown in Arizona be packed there. This type of measure, while evenhanded on its face, is in fact classically protectionist—it burdens only nonlocal interests by requiring them to transfer some operations to the legislating jurisdiction. Such economic protectionism is forbidden by the Commerce Clause. Only last Term, the Court confirmed that *Pike* involved this type of discriminatory effect

on interstate commerce. See *C & A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677, 1682-83 (1994). See also *id.* at 1688-89 (O'Connor, J., concurring in the judgment); *id.* at 1700-01 (Souter, J., dissenting). The Seventh Circuit, which distinguished *Pike* on precisely that basis (see Pet. App. 12), is thus squarely in line with this Court's own view of *Pike*. Accordingly, the balancing that *Pike* requires is appropriate not for all cases of facially neutral regulation, but only those that "bear more heavily on interstate commerce than on local commerce," as the Seventh Circuit held. Pet. App. 11.

This Court's cases subsequent to *Pike* explain why the Commerce Clause requires more than a rational basis only when facially neutral laws impose greater burdens on interstate commerce than on local interests—the discriminatory effect of such laws gives the Court pause about whether the legislature fairly considered the magnitude of the burdens felt elsewhere and the necessity for imposing them. When a facially neutral law imposes discriminatory burdens on nonlocal interests there is reason to distrust the legislature's willingness to give sufficient consideration to those burdens. See, *e.g.*, *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 670-71 (1981) (plurality opinion); *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 441 (1978). Conversely, the cases have identified no reason to distrust an enactment that burdens local residents no less than nonlocal interests. To the contrary, this Court has long recognized that when a challenged enactment burdens local and out-of-state interests proportionately, there is no basis to assume that local legislatures will impose unjustified burdens on commerce, since those burdens will be felt by their own constituents. See, *e.g.*, *Clover Leaf Creamery*, 449 U.S. at 471 & n.17; *South Carolina State Highway Department v. Barnwell Brothers, Inc.*, 303 U.S. 177, 187 (1938).

Here, the district court found that the spray-paint ordinance was not discriminatory in either purpose and effect.

See Pet. App. 46; 803 F. Supp. at 142-43. Petitioners do not quarrel with that finding, for it is indisputable—for every dollar an out-of-state manufacturer or distributor loses in sales in Chicago, Chicago-based retailers also lose a dollar. Indeed, if anything, the ordinance disproportionately burdens Chicago retailers and residents. Under the ordinance Chicago residents must either do without spray paint altogether, or they must travel to the suburbs and then bring it back into the City, while Chicago retailers lose all of their spray-paint sales. In contrast, as the district court found, out-of-state distributors will lose only the fraction of their sales attributable to Chicago, and suburban retailers will actually gain sales. See Pet. App. 40-42. Hence there is no reason in this case to be suspicious of the legislative motivation and process—it is implausible to suggest that Chicago would place burdens on its own residents and businesses unless the legislature truly believed in the efficacy of the ordinance. And, if the ordinance proves ineffective, there is every reason to believe that local interests will assert themselves politically and secure its repeal. The justification for heightened scrutiny present when an enactment bears more heavily on nonlocal interests is absent here; and, at bottom, that is all the Seventh Circuit has held.

Petitioners' claim that the Seventh Circuit ignored *Pike* overlooks another important aspect of Commerce Clause jurisprudence. *Pike* itself admonished that courts, when applying the test, should balance the burden on commerce against the "putative local benefits" of challenged legislation. See 397 U.S. at 142. Petitioners appear to acknowledge this formulation (*e.g.*, Pet. 21 (urging a test that permits courts to conduct "an evidentiary hearing when weighing the burden imposed on interstate commerce versus the putative benefits of the ordinance")), yet they do not apply it. Their version of the Commerce Clause violation in this case ignores the "putative" local benefits—the reduction in graffiti vandalism in the City of Chicago.

The district court did not balance that putative benefit against the burden on commerce, and petitioners do not even attempt to explain how the burdens outweigh the benefits if they are accepted. Permitting a trial court to conduct its own inquiry into the benefits that will flow from a nondiscriminatory enactment reads the word "putative" out of the *Pike* test.

We know of no decision of this Court or any circuit in which a nondiscriminatory regulation was invalidated under the Commerce Clause based on a finding that it would not achieve local benefits. Certainly none of the decisions on which petitioners rely is such a case. *Pike* is not, for that statute was discriminatory in effect, as we explain above. And in other instances in which the Court has struck down facially neutral laws under the Commerce clause, it has done so by concluding that the statutes at issue bore more heavily on out-of-state interests and hence, in practical effect, discriminated against interstate commerce. See *Kassel*, 450 U.S. at 675-76 (plurality opinion); *Raymond*, 434 U.S. at 446-47.[3] In *Oregon Waste Systems v. Department of Environmental Quality*, 114 S. Ct. 1345 (1994), and again in *C & A Carbone*, the Court invalidated statutes as discriminating against interstate commerce and in favor of local interests. See *C & A Carbone*, 114 S. Ct. at 1682-84; *Oregon Waste Systems*, 114 S. Ct. 1350-51. These cases say nothing about the scope of review of legislative findings applicable when an enactment has no discriminatory purpose or effect.

Curiously, petitioners also rely on *Clover Leaf Creamery*, but in that case the Court upheld the challenged

[3] In fact, in *Kassel* the concurring and dissenting Justices—a majority of the Court—expressly concluded that a court lacks authority under the Commerce Clause to decide if a challenged enactment is efficacious in the absence of discrimination against interstate commerce. See 450 U.S. at 680 (Brennan, J., concurring in the judgment); *id.* at 690-93 (Rehnquist, J., dissenting).

statute against Commerce Clause attack, deferring to the legislature's judgment as to the utility of the legislation, despite the fact that the statute bore more heavily on the out-of-state distributors that used the type of milk cartons the Minnesota statute prohibited. See 449 U.S. at 473. Again, the Seventh Circuit explained *Clover Leaf Creamery* in precisely this way. See Pet. App. 12. *Clover Leaf Creamery* does not help petitioners at all.

Petitioners criticize the Seventh Circuit for identifying three different categories of Commerce Clause cases, but this Court has done just that. Even petitioners acknowledge that the Court distinguishes between regulations that expressly discriminate against interstate commerce and those that are facially neutral. See Pet. App. 16 (noting that the Court made this point in *Oregon Waste Systems*, 114 S. Ct. at 1350, and *C & A Carbone*, 114 S. Ct. at 1682). And, as we explain above, in this second category of cases, this Court has observed that heightened scrutiny is appropriate only when there is reason to believe the enactment bears more heavily on out-of-state interests not represented in the local political process. The Court has consistently deferred to local legislative judgments when there is neither a discriminatory purpose nor any discriminatory effect present. See, *e.g.*, *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978).[4]

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[4] Petitioners further complain that the court of appeals' recognition of a category of cases requiring only rational basis scrutiny was inconsistent with the position we took in that court. This submission ignores an entire section of our brief in the court below. We expressly argued that, because the district court had found no discriminatory purpose or effect, the federal interest in protecting interstate commerce against discrimination was absent and there was "no reason why the federal courts need oversee the results of the local political process." Brief and Circuit Rule 30(a) Appendix of Appellant City of Chicago at 35. Accordingly, we argued that in this type of case "the *Pike* inquiry should ask no more than whether a rational basis exists for the legislature's conclusions." *Id.* at 36 n.15. That, of course, was the precise holding of the Seventh Circuit.

Petitioners also claim that the decision below is in conflict with decisions in other circuits, although they have not identified a single case like this one. Instead, they rely on cases in which a challenged enactment had a discriminatory purpose or effect. For example, in *Fireside Nissan, Inc. v. Fanning*, 30 F.3d 206 (1st Cir. 1994), Rhode Island had allowed existing in-state, but not out-of-state, automobile dealers within a 20-mile radius of a proposed new dealership to protest the establishment of that dealership. See *id.* at 209-14. Accordingly, the court assessed Fireside's claims of discriminatory purpose and effect under heightened scrutiny. See *id.* at 214-18. Significantly, the court upheld the statute even under that more stringent standard. See *ibid.* In *SDDS, Inc. v. South Dakota*, 47 F.3d 263 (8th Cir. 1995), the court considered a statute that required a referendum before an applicant could obtain a permit to construct a waste disposal facility. The court held that the statute had both a discriminatory purpose (*id.* at 268-70) and a discriminatory effect (*id.* at 270-71) and invalidated it (*id.* at 271-72). But even as it did so the court observed that heightened Commerce Clause scrutiny is not appropriate when an enactment does not have a discriminatory purpose or effect. See *id.* at 267-68. *Barber v. Hawaii*, 42 F.3d 1185 (9th Cir. 1994), involved legislation governing the anchorage and mooring of large boats within the ocean waters and navigable streams of Hawaii. The court examined both the alleged discriminatory effect—because the plaintiffs claimed that the statute bore more heavily on vessels from outside Hawaii—and the alleged burden on interstate commerce and upheld the statute. See *id.* at 1194-95.

Other cases petitioners cite invalidating state or local legislation are even easier to distinguish. *Cooper v. McBeath*, 11 F.3d 547 (5th Cir.), cert. denied, 114 S. Ct. 2675 (1994), for example, involved a state statute requiring persons holding permits under the alcoholic beverage code to be residents of the state. The court struck

it down as "simple economic protectionism." *Id.* at 548; see also *id.* at 553. *Diamond Waste, Inc. v. Monroe County*, 939 F.2d 941 (11th Cir. 1991), involved a county resolution that precluded importation of refuse from out of the county. This practice was branded as discriminatory in *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), and hence was invalid. The practice at issue in *Medigen of Kentucky, Inc. v. Public Service Commission*, 985 F.2d 164 (4th Cir. 1993), had two problems. There, haulers and transporters of infectious medical waste were required to convince a state commission that existing transportation services in a particular area of the state were not "reasonably efficient and adequate" in order to operate in that area. See *id.* at 166. The scheme thus acted as a barrier to entry into the market of hauling medical waste. See *id.* at 166-67. Such measures are always suspect because they preserve a noncompetitive market for local interests. Even worse, the measure was irrational. The state's asserted purpose for the legislation was to ensure that services for medical waste disposal were available at reasonable prices, yet the state could offer no explanation of how limiting access to the market could serve that purpose. See *id.* at 167.

Blue Circle Cement v. Board of County Commissioners, 27 F.3d 1499 (10th Cir. 1994), like *Medigen*, was a case with two problems not present here. There a zoning ordinance prohibited the use of hazardous waste fuel (HWF) at Blue Circle's cement factory. In fact, by requiring minimum acreage and set-backs from residential areas for all sites at which HWF could be burned, the ordinance effectively prohibited it everywhere in the county. See *id.* at 1510. The court's primary holding was that the district court had improperly converted a motion to dismiss into a motion for summary judgment without notice to the plaintiff, which had prejudiced Blue Circle's ability to present its case. See *id.* at 1503-04. In light of this procedural issue, much of the court's

discussion about the Commerce Clause issue is dicta. Further, the court was troubled by Blue Circle's Commerce Clause claim that the ordinance at issue had the practical effect of preventing the importation of HWFs into the county altogether, in order to protect its residents from their allegedly harmful effects. Given this claim, the court properly questioned whether the ordinance was "a reasonable response to protect a legitimate local concern or whether it [was] really a sham, with the purpose and effect simply of frustrating the policy of [federal law] to encourage the recycling of hazardous wastes and the safe use of HWFs." *Id.* at 1510. Here, petitioners do not claim that the spray-paint ordinance is a sham, and they did not claim or prove that it undermined federal policies. Thus, there is no conflict with *Blue Circle Cement*, which concerns an entirely separate branch of Commerce Clause jurisprudence. Where local legislators attempt to advance the interests of their constituents at the expense of interstate commerce, they engaged in simple protectionism justifying heightened Commerce Clause scrutiny. See, *e.g.*, *Oregon Waste Systems*, 114 S. Ct. at 1353-54; *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources*, 112 S. Ct. 2019, 2026-27 (1992); *Chemical Waste Management v. Hunt*, 112 S. Ct. 2009, 2012-16 (1992). Petitioners do not advance such a claim here.

That leaves only *New York State Trawlers Association v. Jorling*, 16 F.3d 1303 (2d Cir. 1994). But that case neither conflicts with this one nor aids petitioners in any way. There the court held that regulations governing the taking of lobsters by trawlers were nondiscriminatory, and accordingly upheld them because they were "rationally related to advancing a legitimate state interest." *Id.* at 1308. That is precisely the approach of the court of appeals in this case.

Petitioners seem to acknowledge that the decision below is consistent with prior decisions in both the Third and

Seventh Circuits (from which this Court has denied certiorari). See *Instructional Systems, Inc. v. Computer Curriculum Corp.*, 45 F.3d 813 (3d Cir. 1994), cert. denied, 115 S. Ct. 1176 (1995); *Old Bridge Chemicals, Inc. v. New Jersey Department of Environmental Protection*, 965 F.2d 1287 (3d Cir.), cert. denied, 113 S. Ct. 602 (1992); *Amanda Acquisition Corp. v. Universal Foods Corp.*, 877 F.2d 496 (7th Cir.), cert. denied, 493 U.S. 955 (1989). Although petitioners attempt to portray these circuits as renegades, petitioners do not explain how the validity of the spray-paint ordinance would have been decided any differently under any of the decisions that they cite. Rather, even in those cases, the courts defer to the legislature's judgment on the efficacy of nondiscriminatory regulation. See, *e.g.*, *Fireside Nissan*, 30 F.3d at 218; *Pacific Northwest Venison Producers v. Smitch*, 20 F.3d 1008, 1014-16 (9th Cir.), cert. denied, 115 S. Ct. 297 (1994); *New York State Trawlers*, 16 F.3d at 1307-08. While we have not found a plethora of decisions addressing the test for truly nondiscriminatory regulations such as the spray-paint ordinance, this is likely because litigants rarely have the boldness to challenge social or economic legislation solely because they disagree with the legislature's judgment on the wisdom and utility of the legislation. The very notion of such a challenge harks back to the era of *Lochner v. New York*, 198 U.S. 45 (1905), when courts routinely second-guessed legislative policy judgments. Of course, *Lochner* is now long dead; the Court should reject petitioners' invitation to resurrect it.

2. Petitioners also seek review of the court of appeals' conclusion that they were not entitled to an evidentiary hearing on their Commerce Clause claim. It is puzzling that petitioners press this claim, since it is plainly a moot point at this stage in the litigation. Petitioners in fact received the evidentiary hearing—a six-day bench trial—to which they believe themselves entitled. As the case comes to this Court, petitioners' complaint about the Seventh Circuit's conclusion that the district court need

not have conducted this hearing is at best an academic question.[5]

And even on that abstract legal issue, petitioners fail to identify any material factual dispute between the parties that required a trial. Petitioners have never claimed that the spray-paint ordinance is discriminatory in purpose or effect, or that the burden it imposes on interstate commerce is more than incidental. Indeed, the court of appeals acknowledged that such claims might have required a trial, had petitioners made them. Pet. App. 13. But petitioners do not want these issues tried. They want a trial on the issue whether the ordinance will in fact ameliorate the problem of graffiti vandalism in Chicago. But as we explain above, courts have no authority to question the wisdom and efficacy of legislation that is nondiscriminatory in purpose and effect. Thus, as a matter of law, the question of the efficacy of the ordinance was not appropriate for resolution by a trial.

Petitioners' reliance on *Raymond*, *Kassel*, *Clover Leaf Creamery*, and *Blue Circle Cement* for this portion of their submission is misplaced. As we explain above, in each of those cases the challenged enactment bore more heavily on out-of-state interests, and hence created the type of discrimination that triggers heightened Commerce Clause scrutiny. The ordinance at issue here does not create the same problem.

Most likely, petitioners' real quarrel with the decision below is not over the now-moot question whether a trial should have been held, but instead about the court of appeals' failure to defer to the findings of fact that the

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[5] Petitioners attempt to make some hay out of Judge Rovner's concurring opinion, but it in fact is no more favorable to them than the majority opinion. Judge Rovner not only endorsed the majority's conclusion that heightened scrutiny is inappropriate in cases of nondiscriminatory enactments (see Pet. App. 16), but also added that "because plaintiffs never alleged that Chicago's ordinance discriminates against interstate commerce in any way, [the balancing test in] *Pike* was never activated, and a trial was therefore unnecessary." Pet. App. 17-18.

district court made on the efficacy of the spray-paint ordinance. Of course, once the district court concluded that the legislation was not discriminatory in purpose and effect, it had no authority to second-guess the legislative judgment on this point unless it was wholly irrational. And tellingly, petitioners do not quarrel with the holding below that, under the rational-basis test, the Chicago City Council could reasonably have believed that a ban on the retail sale of spray paint would ameliorate the problem of graffiti vandalism in Chicago. See Pet. App. 4-7. The district court's findings on which petitioners rely so heavily are simply irrelevant.

In fact, the Court made this very point in *Brotherhood of Locomotive Fireman & Enginemen v. Chicago R.I. & P. Co.*, 393 U.S. 129 (1968). At issue in that case were Arkansas statutes prescribing a minimum number of crew men for freight trains and train switching operations. The railroads, seeking to establish a Commerce Clause violation, claimed that the extra crewmen did nothing to add to safety in train operations. See *id.* at 135. In its findings of fact after a trial, the district court agreed. See *id.* at 135-36. This Court reversed, rejecting the entire mode of analysis undertaken by the district court: "We think it plain that in striking down the full crew laws . . . the District Court indulged in a legislative judgment wholly beyond its limited authority to review state legislation under the Commerce Clause." *Ibid.* The Court reasoned:

> The District Court's responsibility for making "findings of fact" certainly does not authorize it to resolve conflicts in the evidence against the legislature's conclusion or even to reject the legislative judgment on the basis that without convincing statistics in the record to support it, the legislative viewpoint constitutes nothing more than what the District Court in this case said was "pure speculation."

Id. at 139-40.

The same limitation on the authority of a district court applies here. The district court should not have rejected

a legislative policy judgment merely because it found petitioners' policy arguments more convincing than the legislature did. If that were the rule, many if not most legislative innovations that affect commerce could be set at naught, for when predictive judgments must be made about the efficacy of legislative solutions to vexing social problems, there will often be room for reasonable disagreement with the legislature's decision. Petitioners' expert witnesses testified at trial that the spray-paint ordinance will not ameliorate the problem of graffiti vandalism, and their views may well prove correct. But the conclusion of the City's experts that, by making spray paint less readily available to potential vandals, the ordinance will reduce graffiti vandalism, is plausible as well, as the court of appeals concluded. See Pet. App. 5-7. Under our constitutional framework, the resolution of such policy disputes should be in the legislatures, not the district courts.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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